84- 998

No.

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., J. RAY MCDERMOTT & CO., CATALYTIC, INC., and BURNS & ROE, INC.,

Petitioners

v.

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE AND SHIRLEY A. BAADE, HIS WIFE, ALBERT C. GEORGE AND M. ISABEL GEORGE, HIS WIFE, VICTOR HEBEL, P. G. ENGINEERING, CHANCEFORD MANOR VILLAGE SEWAGE CO., INC., CHANCEFORD MANOR VILLAGE WATER CO., INC., DOROTHY S. HOSTETTER, L. RICHARD HARNER AND LINDA HARNER, HIS WIFE, JAMES BARRON AND DIANE BARRON, HIS WIFE, MARGARET MARY JONAS, CUMBERLAND WOODCRAFT COMPANY, INC., POCONO BUSINESS FURNITURE, INC., FORGET-ME-NOT, INC., LARRY WELKER FORD, INC., DR. MAXINE C. BUSH, REV. ALVA TOMPKINS, MUSETTE DUGGAN, WELS I. ZIMMERMAN, HARRY WALLACH, MARY W. HUTCHINSON, STEPHEN M. YOUNG, FMG INVESTMENTS, INC., GETTYSBURG TOURS, INC., HERITAGE INNS, INC., L. E. SMITH WHOLESALE DISTRIBUTORS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The scores of actions filed in the wake of the Three Mile Island accident present the first test of the Price-Anderson Act "substitute" compensation mechanism for those suffering injury or damage as a result of a "nuclear incident". In this action plaintiffs claim an entitlement to recover for increased electric rates which they attribute to the incident, a theory of liability that would generate damages in excess of the $560,000,000 limit of liability fixed by the Act. In this context:

1. Does a federal district court have "arising under" jurisdiction to hear and determine the merits of the novel claims for relief alleged by the plaintiffs to be created by federal law?

2. Is that jurisdiction sustained as well by the need to resolve as a matter of federal law the extent to which and the manner in which the content of rules of decision derived from state law are to be integrated into the federal program so as to implement and effectuate the Congressional purposes?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the case.[1]

1. Pursuant to Rule 28.1 of the Revised Rules of the Supreme Court of the United States, the affiliates and subsidiaries of the defendant corporations are listed in the Disclosure Statement which defendants filed with the Court of Appeals for the Third Circuit and which appears here at A-48.

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Petitioners

v.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power and Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., J. Ray McDermott & Co., Catalytic, Inc., and Burns & Roe, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 24, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit and the opinion of the United States District Court for the Middle District of Pennsylvania and the report of the Magistrate are unreported as yet and appear in the Appendix hereto at A-1, A-20 and A-10, respectively.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on October 24, 1984 (A-26, A-1), affirms dismissal of the action, but it does so on the ground that the district court lacked federal subject matter jurisdiction, thereby setting aside the summary judgment on the merits which had been entered in defendants' favor below. The Court of Appeals denied a timely petition for rehearing by the panel or rehearing in banc on November 19, 1984 (A-28), and this petition for certiorari was filed within ninety (90) days of that date. Issuance by the Court of Appeals of a certified judgment in lieu of a formal mandate has been stayed by that Court until December 26, 1984 (A-30).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28, Section 1331, United States Code, provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28, Section 1337, United States Code, provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

Title 42, Section 2012, United States Code, is set forth in the Appendix at A-64.

Title 42, Section 2014, United States Code, is set forth in the Appendix at A-65.

Title 42, Section 2210, United States Code, is set forth in the Appendix at A-71.

STATEMENT OF THE CASE

In this civil action, one of many filed in the wake of the Three Mile Island accident, the "property damage" claim made on behalf of the alleged class is for an amount in excess of one billion dollars, far more than the $560,000,000 limit on liability in the Price-Anderson Act. The matter comes to this Court because, in the course of hearing argument on the merits of a summary judgment granted defendants, the Court of Appeals for the Third Circuit, *sua sponte*, and without briefs on the issue, ordered that the case be dismissed for want of subject matter jurisdiction. The opinion of the Court of Appeals will not only require this action to be begun anew in the state courts, but it also threatens to unravel much of what has been accomplished by the long and arduous efforts of the United States District Court for the Middle District of Pennsylvania (Harrisburg) to coordinate and resolve the dozens of actions filed since the accident on behalf of many thousands of claimants.

On March 28, 1979, the worst accident in the history of commercial nuclear power occurred at Unit 2 of the Three Mile Island nuclear generating station ("TMI"). That accident caused the "financial protection" system structured by Congress in the 1957 Price-Anderson amendments to the Atomic Energy Act to be invoked for the first time to deal with the multitude of claims which ensued. All of the suits filed in the aftermath of the accident have been proceeding in the United States District Court for the Middle District of Pennsylvania where the judge assigned to them has devoted over five years to their careful coordination and disposition.

Among those claims was the present action, filed in the district court in 1981, which seeks to recover money damages allegedly suffered by a class of Pennsylvania and New Jersey ratepayers in the form of increased electric rates stemming from utility commission orders which authorized those higher rates on account of the need to

purchase more expensive replacement power and to offset some of the clean-up costs.

Paragraph 1 of the complaint avers that:

> "1. These are actions for damages and equitable relief arising under principles of federal common law; under the Act of August 30, 1954, 68 Stat. 921, 42 U.S.C. §2011 *et seq.* as amended, popularly known as the Atomic Energy Act, including the Act of September 2, 1957, P.L. No. 85-256, 71 Stat. 576, 42 U.S.C. §2210 as amended, popularly known as the Price-Anderson Act, and under the law of the Commonwealth of Pennsylvania, in order to obtain redress for Plaintiffs and members of the Plaintiff classes from Defendants for injuries and damages arising out of a nuclear incident, to wit: that which occurred at the Three Mile Island nuclear electric generating facility in Dauphin County, Pennsylvania, on, about and after March 28, 1979."

The district court's jurisdiction is invoked in Paragraphs 2 and 3 of the complaint:

> "2. This complaint is filed and these proceedings are instituted under the Price-Anderson Act, 42 U.S.C. §2210, under 28 U.S.C. §§1331 and 1337, and more specifically, 28 U.S.C. §1337(a)."

> "3. This Court has jurisdiction of the subject matter, and venue is proper under 28 U.S.C. §§1331 and 1337 and 42 U.S.C. 2210 . . . ."

The contention with respect to the "Price-Anderson" claim is spelled out more clearly in the briefs filed by plaintiffs in the courts below. Specifically, plaintiffs contend that their out-of-pocket costs occasioned by paying the increased electric rates constitute "property damage" within the meaning of §3 of the Price-Anderson Act, 42 U.S.C. §2014(q). Drawing upon expressions in the legislative history of the Act to the effect that Congress' in-

tent was to assure "financial protection" with respect to "any form of damage" caused by a "nuclear incident", plaintiffs claim a federally created right to recover from the federally created financial protection fund on account of their increased electric rates.

Defendants answered the complaint, denying any right to recovery, and subsequently moved for summary judgment. The district court (following reference to, and a report from, a magistrate) granted the motion. Plaintiffs timely appealed to the Court of Appeals for the Third Circuit, where the matter was fully briefed on the merits. At oral argument, however, a member of the Panel raised the question of federal jurisdiction and an extemporaneous argument on the subject followed. Without inviting briefs on the question, the Panel thereafter determined to dismiss the case for want of federal jurisdiction. In so doing, the Panel in effect overruled the earlier, carefully reasoned, district court opinion sustaining federal question subject matter jurisdiction in related Three Mile Island cases, an opinion which had been rendered after thorough briefing and full argument on the question. *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980). On November 19, 1984, defendants' petition for rehearing or rehearing in banc was denied and this Petition followed.[2]

REASONS FOR GRANTING THE WRIT

The litigation from which this petition arises and, indeed, the response to the Three Mile Island accident of which it is a part, are of national importance. Since this is the first test of the substitute "compensation mecha-

2. On December 11, 1984, the Court of Appeals issued an order providing that the "issuance of the certified judgment in lieu of formal mandate in [this] cause be, and it is hereby stayed until December 26, 1984, with the understanding that a petition for writ of certiorari will be filed on or before that date." This petition, now timely filed, will result in further stay of the issuance of the certified judgment.

nism"[3] which Congress created in the Price-Anderson Act, many of the issues presented are ones of first impression, including the question specifically addressed by this petition.

For more than five years, the district court and the parties have been engaged in implementing the program which Congress thought critical to the encouragement of commercial nuclear power — a program intended to assure that, if a nuclear accident were to occur, compensation would be made available via "a reasonably just substitute for the common-law or State tort law remedies [the Act] replaces."[4]

The decision of the Court of Appeals is wrong purely as an application of subject matter jurisdiction principles, a point addressed below. But the error is larger than simply a misapplication of those principles. It necessarily proceeds from a cramped interpretation of the Act, the Congressional objectives sought to be furthered and the nature of the claims which plaintiffs present. While couched in subject matter jurisdiction terms, the decision threatens effective implementation of the Act as a whole, both in this litigation and in any future litigation, should another accident occur.

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3. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 89 (1978).

4. *Id.* at 88. Both the text and the legislative history of the Price-Anderson amendments show that Congress had two primary purposes in mind when it adopted the "financial protection" program. "Financial protection" was provided to the public in that the public was assured of a source of funds wholly separate from the assets of the utility to compensate it for any damages suffered in a "nuclear incident". Incentive to develop nuclear energy was provided to the industry by limiting liability to $560,000,000, and by structuring an insurance and federal indemnity program to fund that limited liability. 42 U.S.C. §2012(i); *Duke Power, supra*, 438 U.S. at 58.

A.

It is now widely conceded that the Three Mile Island accident was of a nature wholly unanticipated by Congress. While the amount of radiation actually released turned out to be relatively inconsequential compared to the meltdown and other high release scenarios which Congress had studied, the threat of harm was perceived at the time of the accident to be substantial. Widespread evacuation occurred, some of it encouraged by the Governor of Pennsylvania after consultation with the N.R.C. Press reports suggested an imminent meltdown or a hydrogen bubble explosion, each with life and property threatening potential. Enormous efforts were undertaken at the federal, state and local levels to cope with the many problems presented, and significant numbers of people evidenced signs of at least short-term emotional stress, if not panic.

The mechanism which Congress had originally intended to be used to separate serious from non-serious accidents, the so-called "extraordinary nuclear occurrence" determination by the N.R.C., 42 U.S.C. §§2014(j), 2210(n), proved ineffective. The N.R.C. proposed to make its non-reviewable determination promptly, but because of the complexity of the situation, it could not do so. Finally, more than a year after the accident, the agency held that there had been no extraordinary nuclear occurrence, even though the thousands of claims which had meanwhile been filed would, if sustained, render that determination fallacious in all but the aseptic technical sense.

It was probably not surprising that numerous "public liability" claims would be made for "financial protection", given the level of concern generated at the time of the accident and the unceasing media attention focused upon and further spurring that concern. But the claims which arose were not, with some exceptions, of the type Congress apparently contemplated. There was no radi-

ation contamination clean-up required off site, nor was there loss of use of property on account of such contamination. There were no acute radiation health effects as would follow from high level exposures, nor should there be any detectable long-term radiation induced injuries (although a number of both types of effects are claimed).

What did follow were, for example, thousands of claims for evacuation expenses, business interruption claims, wage loss claims, emotional distress, fear of cancer and "chromosomal" injury claims, claims by tourism industry members for loss of patronage, and the claims in the present action — claims to recover electric rate increases which the complaint attributes to the accident.

Over three thousand claims were processed administratively, as provided in 42 U.S.C. §2210(m). And more than forty-five suits were filed, many of them as class actions, which potentially implicated the interests of hundreds of thousands of Pennsylvania and New Jersey residents, municipalities and other governmental entities, and business organizations. Most of the suits were filed in the United States District Court in Harrisburg, though one was filed in the Southern District of New York and transferred to Harrisburg, and another (a diversity action) has recently been filed in the Southern District of Mississippi and awaits transfer to Harrisburg. Some actions were begun in various Pennsylvania state courts and were subsequently removed to the federal court.

In part as a consequence of the omnibus insuring provision of the Act, 42 U.S.C. §2014(t), implemented through the "Facility Form" insurance policy specified at 10 C.F.R. §140.91 Appendix A, all defendants were able to retain one law firm to represent them in the litigation, and through early consultations with various plaintiffs' counsel, numerous steps were proposed to streamline the litigation so as to minimize its transactional costs and the burden on the judiciary.

There has followed a series of pretrial conferences, pretrial orders, stipulations, coordinated discovery pro-

cedures, settlements or partial settlements, summary or partial summary judgment motions and, ultimately, schedules for trial planning and trials. Throughout, there has been a strong and guiding hand by the trial judge and an extraordinary level of cooperation among all counsel supportive of the coordinated nature of the proceedings. Transactional costs of the litigation have in fact been minimized and judicial resources as a whole have been conserved. No similar results could have been attained had this litigation been scattered in a variety of state courts in Pennsylvania and New Jersey (with a few cases in federal court because of diversity).

A decision which aborts this process before it reaches full fruition and which impacts centrally on the implementation of an important federal statute deserves review in this Court.

B.

This action is itself of critical importance to the administration of the Price-Anderson Act since the claim made is for an amount far in excess of the $560,000,000 limit on liability in the Act.

As this Court is aware from its several examinations of the Atomic Energy Act, the federal government's interest and involvement in nuclear power has evolved from a complete federal monopoly to a program which promotes private ownership and use of nuclear materials, subject to extensive federal regulation. When the Price-Anderson Act was adopted in 1957 as an amendment to the Atomic Energy Act, the United States owned all nuclear material, the hazards of which were the subject of the financial protection system. Indeed, almost ninety percent of the original financial protection fund was supplied in the form of federal indemnity agreements, with the balance supplied through private insurance in the policy form promulgated by the Atomic Energy Commission.

In the 1975 amendments to Price-Anderson, Congress transferred the bulk of its indemnity obligation to all nuclear power plant licensees, through the so-called "secondary level" of financial protection pursuant to which every holder of a licensed operating reactor shares responsibilities with respect to "public liability" affixed as a result of a "nuclear incident".[5] At the time of the TMI accident, there was $140,000,000 available in the primary level of financial protection, $335,000,000 available through the secondary level obligations of the dozens of utility licensees located throughout the United States, and $85,000,000 available in the form of the United States' indemnity undertaking. In addition, as pointed out by this Court in *Duke Power*, standing behind this entire structure was the Congressional promise to revisit any nuclear incident resulting in damages in excess of the $560,000,000 limit of liability imposed by Congress.[6]

The increased electric rates at issue here far exceed one billion dollars.[7] Thus, without regard to all of the other TMI claims already paid or still being litigated, the outcome of this one case, if favorable to the plaintiffs and their class, could directly affect the United States Treasury as well as the finances of all other utilities operating nuclear reactors, and may require Congress to consider its promise to reexamine the financial consequences of a nuclear incident of such size. In short, this one action is of national concern.

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5. The secondary level is mandated at 42 U.S.C. §2210(b). "Public liability" is defined at 42 U.S.C. §2014(w) [A-69], and "nuclear incident" is defined at 42 U.S.C. §2014(g) [A-67]. The phrase "public liability claims", "claims for public liability", or "public liability action" to describe claims against this self-contained compensation system is used throughout the Act and its legislative history. *E.g.*, 42 U.S.C. §§2210(a), (b), (i), (m), (n) (2) [A-71, 72, 77, 78, 80].

6. 42 U.S.C. §2210(o)(4)[A-83].

7. The rate increases were summarized, as of August 2, 1982, in an affidavit filed in the district court which appears here at A-58.

C.

The decision below requires review now or it may escape review altogether. In the case at hand, once the mandate returns to the district court, that court effectively has no option other than to dismiss the action, which would then presumably be restarted in Pennsylvania and New Jersey.[8] Since there is clearly no argument that federal subject matter jurisdiction is exclusive here, the jurisdictional issue cannot be preserved until the conclusion of any subsequent state court litigation.

Moreover, the district court now has under consideration motions by plaintiffs' counsel in other Three Mile Island cases to "transfer" them to various Pennsylvania state courts under 42 Pa.C.S. §5103, or as to those originally removed from the state courts, to remand them to the state courts in which they were originally instituted. Meanwhile, a number of plaintiffs are refiling parallel state court actions even before any action by the district court.

In short, whatever the errors of the opinion of the Court of Appeals and whatever its failure to consider certain issues supporting federal subject matter jurisdiction, it is rapidly creating the potential for chaos in this litigation. And if the litigation were to become fragmented and begin anew in a variety of state courts, no later decision by this or any other court could or would restore the orderly, coordinated process which has existed heretofore.

A prompt decision by this Court to grant review is the only step that will most clearly assure a continuation of the effective administration of this litigation. Moreover, a failure to provide review would necessarily leave such

8. While it is at least possible that counsel could urge consideration at the district court level of subject matter jurisdiction arguments not considered expressly in the opinion of the Court of Appeals, the likelihood of reconsideration by the district court must be considered remote.

uncertainty that, in the event of another accident, the potential for chaos would far exceed the likelihood of an orderly coordinated process, such as prevailed to this point in the present litigation.

D.

The importance of this action is also underscored by the novel and quintessentially federal claim being made by the plaintiffs, applicable only to a "nuclear incident" as defined by the federal statute and asserted on the face of the complaint to be a right of action created by that federal statute. Thus, in addition to the "federal common law" and state law claims pleaded in the complaint, plaintiffs claim a right to recovery under the Price-Anderson Act *regardless* of what result would obtain under state law. This claim is the converse of that in *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (January 11, 1984) (a non-Price-Anderson Act case) where plaintiff maintained that, notwithstanding federal law and regulation, state tort principles, including punitive damages, should apply.

What plaintiffs assert here is that their increased electric rate costs constitute "property damage" within the meaning of the Price-Anderson Act, entitling them to "financial protection" as a matter of federal law. As such, they argue that Congress has, in defining a "nuclear incident" and a right to recovery in a "public liability action" following such an incident, provided a basis for their recovery that is unique to this federal statute.

This novel theory, whatever its merits, is a matter of obvious federal interest and concern, since its resolution will impact directly upon the interpretation and manner of effectuation of a significant Congressional program.[9]

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9. If plaintiffs' argument is correct and Congress' statement that Price-Anderson was to apply to "any form of damage" is elevated to a federal rule of decision compelling reimbursement of plaintiffs' increased electric rates, then the economic assumptions underlying

It was addressed on the merits in the district court. Yet the effect of the opinion of the Court of Appeals is to send this wholly federal question to a state court system where its resolution may take years, thus blocking this Court from timely review. Given the fact that plaintiffs' articulation of this theory of relief finds its genesis in an interpretation of the Price-Anderson Act subscribed to by this Court in the *Duke Power* decision (a "substitute" compensation mechanism), it is notable that the Court of Appeals' decision says not one word about *Duke Power* even though that decision had been called to its attention in the briefs on the merits and at oral argument.

The opinion of the Court of Appeals does not address this theory of relief, and instead focuses on alternative theories of recovery, with passing reference to a possible "interplay" of federal and state law. Even if only the "interplay" between federal and state law were at issue under plaintiffs' complaint, that "interplay" itself, as noted below, presents federal questions sustaining federal jurisdiction. But this set of substantive issues and their ramifications as to implementation of the Act are brushed aside by the Court of Appeals with the naked conclusion that "none of the Price-Anderson elements are essential to *plaintiffs'* case under state tort and contract law." (Slip Opinion at 5) (emphasis in original). That conclusion apparently rests on the Court's incorrect view that plaintiffs have alleged only two claims: 1) a purely state created right to relief, or 2) a right under rules of decision to be created at large by a federal court ("federal common law"), a theory earlier addressed and rejected on the merits by the Third Circuit in *Commonwealth of Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117, 122 (3d Cir. 1983).

Congress' program and the private insurance industry's response to that program have been grossly in error. This is a matter of grave practical as well as jurisprudential concern.

The fact that in another decision in 1983 the Court of Appeals rejected "federal common law" as a basis for relief might be a reason for rejecting that theory on the merits of this case (preserving it for this Court's review); but it is not a reason for rejecting federal subject matter jurisdiction, thereby delaying this Court's opportunity to entertain and consider the important federal substantive issues which are present here.[10]

E.

The opinion of the Court of Appeals, perhaps in part because the subject matter jurisdiction issue was raised *sua sponte* and then resolved without briefs, contains errors of omission and commission. First, and most obviously, it never addresses the novel, wholly federal claim presented by plaintiffs, one for relief exclusively under the Price-Anderson Act. Such a claim would survive even Justice Holmes' formulation of "arising under" jurisdiction in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action"). Indeed, the Court seems oblivious to this claim by repeatedly characterizing plaintiffs as having only invoked "state-created causes of action", (*e.g.*, Slip Op. at 4), or "federal common law".

Second, the Court places substantial reliance on its *Commonwealth of Pennsylvania* decision in 1983 that no claim would arise from rules of decision fashioned at large by a federal court. Yet, that earlier decision does more than merely decide that federal common law does not give rise to a right of action. Separately, the Court concluded that the summary judgment before it should be vacated insofar as it would preclude any other theory of

10. This may be a case in which it is proper to suggest that this Court grant the writ, summarily vacate the judgment and opinion of the Court of Appeals and direct that Court either to hear and redecide the jurisdictional issues after full briefing and oral argument or to decide the merits so as to make those issues available for this Court's review.

recovery for the kind of "property damage" that plaintiffs were claiming. One such theory on which the Court ordered the proceedings to go forward is grounded squarely on the statutory definition of a "nuclear incident". 710 F.2d at 123. The opinion thus clearly draws a distinction between federal common law giving rise to a claim and the explicit language of the Act doing so. It is, therefore, inconsistent with the argument made by the Court of Appeals in the present case that the *Commonwealth of Pennsylvania* decision, by denying the possibility of a federal common law right of action, also excluded the possibility of statutory interpretation founding a cause of action. Indeed the *Commonwealth of Pennsylvania* opinion necessarily affirms the substantiality (for jurisdiction purposes) of a federal right to relief based upon a statutory definition of "nuclear incident" including the definitions of the terms used therein. The theories of relief advanced in this case, on a complaint filed two years before *Commonwealth of Pennsylvania*, were surely colorable at that time. To suggest that the federal claims became "frivolous" following *Commonwealth of Pennsylvania* is in conflict with that very decision.

Third, the Court fails to address an independent basis for "arising under" jurisdiction (advanced at the impromptu oral argument) which proceeds from a source-of-rule of decision analysis. In the present case, even as to plaintiffs' "state" law claims, the outcome will depend on the federal choices required to integrate state derived rules of decision into the Price-Anderson mechanism which this Court has characterized as "a reasonably just substitute for the common-law or state tort law remedies [the Act] replaces." *Duke Power, supra*, 438 U.S. at 88. While it is clear from the legislative history that Congress did not intend to displace, any more than necessary, the content of state rules relevant to defining the bases of liability, it is consistent with that history (and with this Court's characterization of the Act) to consider such rules as integrated into and thereby forming the content of what

become federal rules of decision. That argument, in this case of first impression, is not a frivolous basis for assuming subject-matter jurisdiction because the very choice of how to characterize and effect the integration is itself a wholly federal question.

But the argument does not depend on that point. Even if relevant state rules will continue to operate of their own authority, only such of those rules as are consistent with Congress' purposes and the federal program Congress has created can operate, and then only in a manner which serves such purposes. Those choices are, of course, matters of federal law and the task of making them, and then integrating them with those rules derived from the Act itself or fashioned interstitially by the courts to effect Congressional purposes is the proper business of the federal courts. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules of Decision*, 105 U. Pa. L. Rev. 747 (1957).[11] This is especially so in a situation involving the first test of an important federal program, where laying the basis for implementation of the program in a manner which will achieve the Congressional goals is critical.

Finally, under *Bell v. Hood*, 327 U.S. 678 (1946), the unique character of this litigation and the novel theories presented in a case of first impression involving application of a federal statute would call for a decision on the merits and not a dismissal for want of jurisdiction. *Bell v. Hood* makes clear that jurisdictional issues must be examined separately from a determination on the merits. Moreover, the jurisdictional inquiry, which focuses on

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11. Since a case arises under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law ...," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2846 (1983), subject matter jurisdiction would be sustainable on this basis, quite apart from plaintiffs' other theories.

the nature of plaintiffs' claims as they appear on the face of the complaint, must be made as of the time when the complaint is filed.

Here, the jurisdictional inquiry confirms that plaintiffs' complaint specifically alleges rights to relief "arising under" federal law. As developed above, those theories are substantial and not "completely devoid of merit." And even if Congress intended state rules to operate of their own force in appropriate spheres, the federal questions presented by the need to integrate them with the definitions in the Act itself and the interstitially-supplied rules necessary to effectuate the purposes of the Act are themselves so central to the vindication of plaintiffs' rights, if any, that plaintiffs' claims arise under federal law in this sense. In other words, there is a necessary resort to the Price-Anderson Act to determine plaintiffs' right to recover.

Moreover, at the time these claims were asserted in federal court the Price-Anderson Act had never been applied in a "public liability action" (except in related TMI litigation). For that very reason none of the parties could safely assume either that the available claims were only state created or that federal law (in the form of federal rules of decision, whether derived from the Act directly or supplied interstitially) would not impact centrally in terms of the resolution of such claims.

Although the Court of Appeals has twice addressed these areas, with inconsistent results, this Court has not until now had an opportunity to explore the effect in operation of the federal program examined in the abstract in *Duke Power*.

As this Court has recognized, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 103 S.Ct. 2841, 2846 (1983). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Delineation of

these issues in a particular context calls for the exercise of judicial judgment. Where, as here, the administration of a complex Congressional structure is involved and the conceptual analysis to date falls far short of a satisfactory resolution, it is surely appropriate that this Court intercede. This is especially true in the present situation in which events have occurred in unanticipated ways and outrun Congressional foresight. It is in just such a situation that it is the proper role and affirmative responsibility of the federal courts to fill the gaps and to deal creatively with the problems generated by experience in the implementation of the Congressional program. Federal courts must have jurisdiction in such cases.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3455

Stibitz, Donald A., New Freedom Lumber Co., Inc., Richard K. Baade and Shirley A. Baade, his wife, Albert C. George and M. Isabel George, his wife, Victor Hebel, P. G. Engineering, Chanceford Manor Village Sewage Co., Inc., Chanceford Manor Village Water Co., Inc., Dorothy S. Hostetter, L. Richard Harner and Linda Harner, his wife, James Barron and Diane Barron, his wife, Margaret Mary Jonas, Cumberland Woodcraft Company, Inc., Pocono Business Furniture, Inc., Forget-Me-Not, Inc., Larry Welker Ford, Inc., Dr. Maxine C. Bush, Rev. Alva Tompkins, Musette Duggan, Wels I. Zimmerman, Harry Wallach, Mary W. Hutchinson, Stephen M. Young, FMG Investments, Inc., Gettysburg Tours, Inc., Heritage Inns, Inc., L.E. Smith Wholesale Distributors, Inc., Individually and on behalf of all others similarly situated,

Appellants

v.

General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power and Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., J. Ray McDermott & Co., Catalytic, Inc., and Burns & Roe, Inc.,

Appellees

---

*Hon. Potter Stewart, Associate Justice (retired) of the Supreme Court of the United States, sitting by designation.

Appeal from the United States
District Court for the
Middle District of Pennsylvania

D.C. No. 81-0422

Argued: June 14, 1984

Before: SEITZ, *Circuit Judge*,
STEWART, *Associate Justice (Retired)**,
and ADAMS, *Circuit Judge*.

(Opinion Filed: October 24, 1984)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

This is an appeal from an order of the district court granting defendants' motion for summary judgment and entering judgment against plaintiffs. Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291.

I.

On March 28, 1979, there was a nuclear accident at the Three Mile Island Power facility ("TMI") near Harrisburg. Reactor units I and II were shut down as a result of that incident. Subsequently, the Pennsylvania and New Jersey Public Utilities Commissions approved increased utility rates to cover the cost of repairing the TMI facility and replacing from other sources the lost power capacity.

Thirty-five individuals and businesses, all purchasers of electricity at the increased rates, filed a class action suit on behalf of themselves and all other similarly situated businesses and professional entities located more than 25 miles from TMI.[1] Plaintiffs seek compensatory and exemplary damages under contract and tort law for economic harm resulting from the

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1 The defendants explain that all damage claims of individuals, businesses, and non-profit organizations within a 25 mile radius of TMI, excluding personal injury claims and claims in favor of governmental entities, were settled and dismissed with prejudice. *In re Three Mile Island Litigation*, No. 79-0432 (M.D. Pa. September 9, 1981).

increased utility rates, which pass part of the cost of the TMI accident on to plaintiffs. The defendants include utilities and other companies that were involved in the design, construction, maintenance, quality assurance, and start-up testing of TMI.

Plaintiffs allege that defendants acted negligently, recklessly, and in violation of standards of care for ultra-hazardous activities. In addition, plaintiffs allege that there were defects in the design, manufacture, construction, and installation of the nuclear reactor.

To the extent apposite, the district court presumably relied upon its prior opinion, *In re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980), in assuming subject matter jurisdiction. This court raised *sua sponte* the issue of whether that exercise of jurisdiction was proper, and gave counsel the opportunity to respond at oral argument. It is to this issue that we now turn.

II.

None of the parties questioned federal subject matter jurisdiction. Indeed, they all argue affirmatively that there is jurisdiction. Counsel rely on the "arising under" language in 28 U.S.C. §§ 1331 and 1337, contending that plaintiffs' state-created causes of action "arose under" the Price Anderson Act. That Act, *inter alia*, provides for a system of indemnification and limited liability, under certain circumstances, in the event of a nuclear incident. It also requires defendants to waive certain defenses they might otherwise have under state law.

Counsel explained at oral argument[2] that the Congressional mechanism for compensation under the Price-Anderson Act would necessarily be implicated in

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2 Counsel for defendants spoke for all parties on this issue.

this litigation. The scope of the Act would then have to be determined and its terms construed. In particular, counsel argued that this case could turn on the meaning of statutory terms such as "public liability" and "nuclear incident." Counsel concluded, therefore, that the great federal interest in the proper application and construction of the Price-Anderson Act provides a basis for federal subject matter jurisdiction under §§ 1331 & 1337.

It is true that "there may be some room for finding federal jurisdiction though both the right and the remedy are state-created, if an important question of federal law is an essential element in the case." Wright, Federal Courts 96 (1983)(footnote omitted); *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974). This is only true, however, if the "well-pleaded complaint rule" is satisfied. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, et al.*, 103 S.Ct. 2841, 2846 (1983). This rule provides that a claim is jurisdictional under the statutory "arising under" language only if "[a] right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Id.* at 2847 (quoting *Gully v. First National Bank*, 299 U.S. 109, 112 (1936)).

Counsel's reliance on the interplay between the Price-Anderson Act and the state law claims in this case must fail as a basis for "arising under" jurisdiction, since none of the Price-Anderson elements are essential to *plaintiffs'* case under state tort and contract law. Whether defendants' liability will be limited or indemnified under the Price-Anderson Act, or whether defendants will be required to waive certain defenses they might otherwise have under state law, has no bearing on the matter of federal jurisdiction. Although such issues may well arise in

the course of the litigation, "they do not show that the suit, that is, the plaintiff[s'] original cause of action, arises under" the laws of the United States. *Id.* at 2847 (quoting *Louisville & Nashville Railroad Company v. Mottley*, 211 U.S. 149, 152 (1908)). Rather, under the "well-pleaded complaint rule," they form no basis for federal jurisdiction.

We hold, therefore, that the plaintiffs' state law claims do not arise under the Price-Anderson Act. To the extent that our holding is inconsistent with *In re Three Mile Island Litigation*, *supra*, this opinion must, of course, control.[3]

III.

The parties explicitly rely only on the federal elements of their state-created causes of action for jurisdiction, as analyzed above. Still, plaintiffs do assert that federal common law fills "the interstices of the federal framework . . . in . . . the Price-Anderson Act (42 U.S.C. § 2210, et seq. 1954)," and they allege injury under federal common law causes of action. We will, therefore, consider whether these allegations provide a basis for federal subject matter jurisdiction.

Initially, we observe that the terms of the Price-Anderson Act do not create federal common law

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3 Plaintiffs' consolidated complaint in *In re Three Mile Island Litigation* alleged an "extraordinary nuclear occurrence," and that complaint was filed before the Nuclear Regulatory Commission ("N.R.C.") conclusively determined that the TMI accident was not an extraordinary nuclear occurrence. *See* 87 F.R.D. at 434, 437 n.8. This factor was considered by the *Three Mile Island* court in its "arising under" analysis. *Id* at 435-38. Since the complaint in this litigation was filed well after the N.R.C.'s determination was made, we have no occasion to consider whether a non-frivolous allegation of an extraordinary nuclear occurrence is a proper basis for "arising under" jurisdiction. *Cf. infra* note 4.

causes of action. In addition, the legislative history unwaiveringly belies any contention that Congress intended to do so. The Joint Committee Report on the original Price-Anderson Act explains, as a basic principle underlying the Act, that:

> Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available.

S. Rep. No. 296, 85th Cong., 1st Sess. 9, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803, 1810.

The Joint Committee Report on the 1966 amendments to Price-Anderson reaffirmed what prior legislative history had made abundantly clear. "Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal inteference with State law. Under the Price-Anderson system, the claimant's right to recover . . . is left to the tort law of the various States . . . ." S.Rep. No. 1605, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. Code Cong. & Admin. News 3201, 3206.

Moreover, Congress considered adopting a new body of Federal tort law in 1966 and it specifically rejected that option, preferring to achieve certainty and uniformity by requiring the nuclear industry to waive certain key defenses to liability which might otherwise be available under state law. The Joint Committee did not "believe it [was] necessary to go to the length of enacting substantive law -- that is, a new body of Federal tort law -- to achieve [its] ends." S.Rep. No. 1605, 89th Cong., 2d Sess. 9, *reprinted in* 1966 U.S.

Code & Admin. News 3201, 3209. Rather, Congress took the waiver approach, which "interfer[ed] with State law to the minimum extent necessary." *Id.*

Accordingly, in *Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al.*, 710 F.2d 117, 122 (3d Cir. 1983), this court affirmed the dismissal on the merits of plaintiffs' Price-Anderson Act federal common law claims, without addressing the jurisdiction issue as to those claims. The *Commonwealth of Pennsylvania* court held that "there is nothing in the statute, the legislative history or any cited case law . . . that convinces us that federal courts should adopt and apply some form of federal common law . . . ." *Id.*

A federal claim which is so insubstantial as to be completely devoid of merit does not involve a federal controversy within the jurisdiction of a federal court. *Hagans v. Lavine*, 415 U.S. 528, 542-43 (1974); *Heckler, Secretary of Health and Human Services v. Ringer, et al.*, 52 U.S.L.W. 4547, 4549 n.4. If, however, "the complaint does . . . raise serious [federal] questions, both of law and fact, which the District Court can decide only after it has assumed jurisdiction over the controversy," dismissal for want of jurisdiction is inappropriate. *Bell, et al. v. Hood, et al.*,327 U.S. 678, 683-84 (1946). In such a case, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Id.* at 682.

The jurisdictional question presented here, then, is whether plaintiffs' federal common law allegations under the Price-Anderson Act, that are certainly insufficient to state a claim upon which relief can be granted, *see Commonwealth of Pennsylvania, supra*, are so completely devoid of merit as to be insufficient to create a federal controversy. It could not be more obvious that the Price-Anderson Act creates no federal

tort causes of action. Congress has said so in so many words. It is equally clear that the Act creates no federal common law of contracts. We hold, therefore, that plaintiffs' federal law claims are "wholly insubstantial" and provide no basis for federal jurisdiction. *Bell, et al. v. Hood, et al.*, 327 U.S. at 683. To hold otherwise would allow plaintiffs to allege frivolous federal claims "solely for the purpose of obtaining jurisdiction . . . ." *Id.*[4]

The order of the district court dismissing the complaint will be affirmed, solely because of the absence of subject matter jurisdiction.[5]

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4 Although the parties did not rely specifically on 42 U.S.C. § 2210 for subject matter jurisdiction in the proceedings before this court, plaintiffs did allege jurisdiction under that provision in their complaint. Section 2210 contains specific grants of federal jurisdiction in subsections (n)(2) and (o). Neither section confers jurisdiction over this particular matter. Section 2210(n)(2) grants original federal jurisdiction for "any public liability action arising out of or resulting from an extraordinary nuclear occurrence . . . ." This provision is inapplicable. *See supra* note 3. Section 2210(o) does not confer jurisdiction over this case either, for it refers only to petitions by indemnitors or other interested parties for a determination whether liability for a nuclear incident may exceeed the coverage mandated by the Act. *See In re Three Mile Island Litigation*, 87 F.R.D. at 436.

5 We, of course, regret the waste of time and resources which result from dismissals of this sort. Federal subject matter jurisdiction is limited, however, and litigants are charged with this knowledge when they determine to litigate in federal court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD A. STIBITZ, *et al.*,	:	CIVIL ACTION
	:	NO. 81-0422
Plaintiffs	:	
	:	
v.	:	
	:	
GENERAL PUBLIC UTILITIES CORP., *et al.*,	:	(Judge Rambo)
	:	
	:	
Defendants	:	

REPORT OF MAGISTRATE

This is a civil action brought by a group of plaintiffs who are users of electricity supplied by defendants General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co. and Pennsylvania Electric Co. The complaint expresses the plaintiffs' objective to have this matter proceed as a class action with a class of plaintiffs consisting of all individuals, cooperatives, proprietorships, partnerships, corporations, institutions and other business and professional entities who reside at a distance of more than twenty-five miles from the Three Mile Island nuclear plant operated by General Public Utilities Corp. and Metropolitan Edison Co. and who are users of electricity supplied by the utility company defendants and who have suffered economic harm by way of increased costs of electric power as a result of the nuclear incident which occurred at the Three Mile Island nuclear plant beginning on or about March 28, 1979. The complaint avers that as a result of the nuclear incident in question, the utility company defendants incurred substantial costs and that the Pennsylvania and New Jersey Public Utility Commissions subsequently determined that some or all of these costs must be borne by the plain-

tiffs as electricity rate payers in order to maintain continuing electricity to the utility company defendants' service area.

In their complaint, the plaintiffs state that their cause of action is brought under the Act of August 30, 1954, 68 Stat. 921, 42 U.S.C. §2011, *et seq.*, as amended, the Atomic Energy Act, including the Act of September 2, 1957, P.L. No. 85-256, 71 Stat. 576, 42 U.S.C. §2210 as amended, the Price-Anderson Act, and under Pennsylvania law. They invoke the jurisdiction of the Court under 42 U.S.C. §2210 and 28 U.S.C. §§1331 and 1337. They aver essentially that the Three Mile Island facility (hereinafter TMI) was negligently[1] designed and constructed, that the facility was negligently operated and maintained, that an ultrahazardous activity on defendants' part gave rise to economic harm and gives rise to liability under strict liability principles, that the defendant public utilities violated statutes, regulations and terms and conditions of the TMI operating license in the operation of the facility, and that there was negligence on the part of the defendants (Babcock & Wilcox Company, J. Ray McDermott & Co., Catalytic, Inc. and Burns & Roe, Inc.) in the design, manufacture, construction and installation of the nuclear reactor at TMI Unit 2, which reactor malfunctioned beginning in late March of 1979. The plaintiffs aver, *inter alia*, that the defendants failed to supply electricity to the plaintiffs in accordance with the terms of their implied contract in effect on the date of the incident. The complaint refers to the nature of damages suffered by the plaintiffs as substantially higher electrical rates, and also avers that plaintiffs have suffered other consequential and incidental damages.

The complaint was filed on March 27, 1981. On August 13, 1982, defendants jointly filed a motion for sum-

1. The plaintiffs aver reckless, wanton and willful misconduct as well; however, any distinctions between the various forms of tortious conduct averred by plaintiffs is not material for purposes of the motion under consideration herein.

mary judgment. Accompanying the motion is an affidavit of Fred D. Hafer, which establishes essentially that as a result of a series of orders of the Pennsylvania Public Utility Commission and of the New Jersey Board of Utility Commissioners, the kilowatt hour rate charged for electricity went from 4.55 cents on July 1, 1979 to 7.50 cents on January 14, 1982 in the case of Metropolitan Edison Co., from 4.25 cents on April 25, 1979 to 6.45 cents on January 14, 1982 in the case of Pennsylvania Electric Co., and from 5.22 cents on July 9, 1979 to 8.42 cents on July 31, 1981 in the case of Jersey Central Power & Light Co. Defendants' motion is accompanied by a statement of material facts as required by Rule 401.4 of the Rules of Court for the Middle District of Pennsylvania, which statement is as follows:

> "1. The Utility Company Defendants are each regulated by the Pennsylvania Public Utility Commission and/or the New Jersey Board of Public Utility Commissioners.
>
> 2. Rates for electrical service are set or approved by the Pennsylvania Public Utility Commission and the New Jersey Board of Public Utility Commissioners.
>
> 3. The rates for electrical service charged by the Utility Company Defendants to the Plaintiffs have been set or approved by the appropriate public utility commission."

In opposing the defendants' motion for summary judgment, the plaintiffs have filed documents establishing that the Pennsylvania Public Utility Commission denied the request of the plaintiffs to issue a declaratory order declaring that that Commission "does not have jurisdiction to grant the relief requested in the case captioned *Stibitz, et al. v. General Public Utilities, et al.*, Class Action No. 81-0432 United States District Court

for the Middle District of Pennsylvania."[2] They have also filed an affidavit of Dr. John W. Gofman establishing essentially that persons exposed to ionizing radiation and their offspring can and do suffer physical injury. They have filed a map indicating the geographic areas in Pennsylvania served by sixteen electric companies including Metropolitan Edison Co. and Pennsylvania Electric Co. They have not filed a statement of material facts as required by Rule 401.4 of the Rules of Court for the Middle District of Pennsylvania.

At the outset of a discussion of this matter, it must be stated that it is very clear from the plaintiffs' complaint that the plaintiffs' causes of action have to do with increased electrical rates following the shutdown of TMI after the incident beginning in late March of 1979. Each named plaintiff is described as a recipient of electricity supplied by one of the utility defendants who lives or operates a business more than 25 miles from TMI. The description of the putative class is, in pertinent part, persons and businesses who have suffered economic harm by way of increased costs of electric power as a result of the nuclear incident at TMI. The plaintiffs aver that "The pass through [by the PUC and NJBPUC] of these costs has caused the Plaintiffs to suffer substantial damages." and that "Plaintiffs have suffered, and continue to suffer, economic loss as a result of the closing of TMI No. 1 and TMI No. 2, in that their electric utility costs are substantially higher than they would have been but for the violations set forth hereinabove." The only language in the complaint under which the plaintiffs could conceivably be seen to have averred a cause of action based upon physical injury to some or all of them is, at page 17 of the complaint, "(b) Plaintiffs and class members have suffered other 'consequential and incidental' damages as a

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2. The Commission denied the request because it found no "specific 'controversy' to be terminated." *See*, App. A to Brief for Plaintiffs.

result of the violations alleged hereinabove." Yet, in opposing defendants' motion for summary judgment, plaintiffs have filed an affidavit establishing that radiation causes physical injury. It becomes clear from a reading of the plaintiffs' arguments that the reason for them to have sought to establish physical injury in connection with defendants' motion is to foster the argument that they have made as to their right to recover damages for their claimed economic harm, and that they are not intending to attempt to independently recover for actual physical injuries by way of this civil action. To the extent that the existence of physical injury to the plaintiffs is asserted by plaintiffs as an element relevant to the plaintiffs' right to recover for economic harm, the Court should treat physical injury to have been established by the Gofman affidavit for purposes of this motion for summary judgment. However, it must be concluded that the plaintiffs' complaint does not contain a cause of action based upon physical injury to the plaintiffs or a claim for damages for physical injury to the plaintiffs.[3]

The analysis of the issues presented by the defendants' motion for summary judgment is appropriately begun with a consideration of the relief that the plaintiffs are seeking. Their electrical rate rose as a result of orders of the PUC and NJBPUC increasing those rates. To a large extent[4] the rate increases were attributable to expenses arising or resulting directly from the TMI incident. The plaintiffs are seeking by their civil action to have returned to them the amount of money representing the increase in electrical rates attributable to the TMI incident. If relief were ultimately granted in plaintiffs' favor, the state public utility commission orders estab-

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3. The plaintiffs' brief does not suggest in any way that this is a claim for damages for physical injuries. *See*, e.g., Brief for Plaintiffs, p.55, ". . . it is the repair and replacement costs that the Plaintiffs are seeking."

4. For present purposes, it should be assumed that the increased rates were entirely attributable to the TMI incident.

lishing utility rates on the basis of the factors and considerations which those commissions are required or permitted to employ as a matter of state law[5] would simply be nullified.

As noted above, the plaintiffs have cited the Price-Anderson Act as a basis for their claims in this case. That Act, however, does not of itself define or create any causes of action. *See, Commonwealth of Pennsylvania v. General Public Utilities Corp.*, ____ F.2d ____ (3rd Cir. 1983), Nos. 82-3421 and 82-3425 (June 23, 1983). The theories upon which the plaintiffs seek to recover, as explained and expanded in their brief in opposition to defendants' motion to dismiss, are contract and tort theories under applicable Pennsylvania law.

One of the theories upon which the complaint asserts a cause of action against the defendants is breach of an implied contract. In Paragraph H of the complaint, it is averred that, "Defendants have failed to supply electricity to Plaintiffs in accordance with the terms of their implied contract in effect on the date of this incident." It may be inferred that this cause of action is limited to the public utility defendants. Defendants contend that their only conceivable implied contract with the plaintiffs is to supply them with electricity at the rate set by the PUC and NJBPUC, in exchange for which the plaintiffs will pay the rate set by the PUC or NJBPUC. The defendants argue that a utility company may only charge the rates approved and ordered by the regulatory commissions, not higher and not lower. An examination of the arguments

5. For purposes of this case, it should be assumed that the state regulatory commissions correctly applied state law and reached correct conclusions on the facts presented. If they did not, the plaintiffs' action represents an application to a federal court to decide state law questions which could have and should have been raised by way of appeals to state courts from the state regulatory determinations. Such an application on its face would raise serious federalism questions and, since the plaintiffs have not asserted that the regulatory decisions were not correct under state law, there appears to be no valid reason for present purposes not to presume that they were.

advanced and cases cited in the plaintiffs' brief discloses that there is no legal basis for recovery on a theory of implied contract. On the contrary, as defendants assert, the implied contract that exists between a public utility and a rate payer is that the utility will provide the service and that the rate payer will pay the rate approved by the utility regulatory body.

The other theory upon which plaintiffs assert that they are entitled to recover the increases in electrical rates is that the defendants' negligence caused the accident and proximately caused the rate increases. Defendants argue that, assuming them to have been negligent, their negligence was not the legal or proximate cause of any harm that befell the plaintiffs.

The negligence of the defendants which resulted in the TMI accident, which negligence will be assumed for present purposes, was not the legal or proximate cause of the increases in the plaintiffs' utility rates. Those rate increases resulted from the decisions of state regulatory adjudicatory panels. The decisions of those panels is a component part of the same overall body of state substantive and procedural law to which belong the principles of liability in tort upon which the plaintiffs seek by this action to undo those decisions. It would be absurd to suppose that one arm of that body is lawfully compelled to undo the task that the other arm of that body has lawfully performed. Stated in other words, it would be absurd to conclude that the tort law of Pennsylvania includes a cause of action by which the plaintiffs can recover the rate increases lawfully ordered by the Pennsylvania Public Utility Commission. To the extent that such rate increases are not lawful, furthermore, it is clear that the plaintiffs' legal remedy would lie in an appeal from the order(s) of the Public Utility Commission.

The parties agree that the Restatement (Second) of Torts, Section 443, has been adopted by both Pennsylvania and New Jersey courts. That section provides that:

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force which is in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

The defendant's negligence, which is assumed for purposes of this motion, was not a force which, in continuous and active operation, resulted in the increased electrical rates charged to the plaintiffs. It was a force which, however long it lasted, did result in substantial economic loss to the utility defendants. This "force" of economic harm was absorbed by and ended with the utility defendants. They were the economic victims of their own negligence, no different from any business which has been harmed economically by its own negligence. The efforts by the ordinary harmed business to atone itself for the harm by increasing prices would not constitute a tort against the business' customers. Nor does the utility company's efforts to do so by application to a utility commission for rate increases.

The only distinction that can be drawn between this case and any other case in which a business, harmed economically by its own negligence, seeks to recoup by raising prices is that here the customer does not enjoy the free market choice to buy a competitor's product. But the fact that a particular enterprise has a lawful monopoly does not change the result insofar as the proximate cause analysis is concerned. The ordinary competitive

company's act of raising prices as a result of increased costs arising from the company's own negligence is, with respect to a customer of that company, a "situation harmless unless acted upon by other forces," such other force being the decision of the customer to buy at the increased price. Here, there is no difference except that the other force is the regulatory agency which ordered the higher prices. The plaintiffs have raised no suggestion, moreover, that the regulatory agencies lacked discretion to pass through none, some or all of the losses to the consumers of the utility company defendants. It is not possible, therefore, to view the regulatory agencies for purposes of an analysis under Section 443 of the Restatement as not being an "other force."

In the case of *J'aire Corp. v. Gregory*, 157 Cal. Rptr. 407, 598 P.2d 60 (1979), cited by the plaintiffs, a contractor who failed to complete construction work in a timely manner was held to be liable in tort for the economic harm suffered by a restaurant business leasing the premises. Even assuming *arguendo* that the California court's decision represents the law of Pennsylvania, the plaintiffs' position here is not strengthened: there, the contractor's delay was a force in operation at the time of the harm being suffered by the restaurant; i.e., while the contractor delayed, the restaurant could not operate. Here, to the contrary, the defendants' negligence had created a situation harmless insofar as the plaintiffs' utility rates were concerned unless and until acted upon by the respective state regulatory agencies, forces for which the defendants were not responsible.

For the foregoing reasons, it is respectfully recommended that defendants' motion for summary judgment be granted.

J. Andrew Smyser
United States Magistrate

Dated: June 29, 1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD A. STIBITZ, *et al.*,	:	CIVIL ACTION
Plaintiffs	:	NO. 81-0422
	:	(Judge Rambo)
v.	:	
	:	
GENERAL PUBLIC UTILITIES CORP., *et al.*,	:	
Defendants	:	

NOTICE

Notice is hereby given that the undersigned has filed with the Clerk of Court a written report, a copy of which is enclosed, containing a recommendation for disposition of this action by the Court.

Any party may object to the report and recommendation within fifteen (15) days from the date of this notice by filing with the Clerk written exceptions setting forth in full the bases of the exceptions. The exceptions may be accompanied by a memorandum or brief in support thereof. The filing of exceptions is not required and, if exceptions are not filed, it will be considered that the party or parties intend to rely on the arguments made in the briefs previously filed.

J. Andrew Smyser
United States Magistrate

Dated: June 29, 1983.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD A. STIBITZ, *et al.*, *Plaintiff*	)	
v.	)	
	)	Civil Action
	)	No. 81-0422
GENERAL PUBLIC UTILITIES CORP., et al., *Defendants*	)	

MEMORANDUM

General Public Utilities and the other defendants have filed a motion for summary judgment. The parties have fully briefed the motion. The matter was submitted to the magistrate who has filed his report and recommendation. No exceptions were filed to the magistrate's report and recommendation. This court has carefully considered all the pleadings, briefs and the applicable law and will adopt the report and recommendation of the magistrate.

The court will not repeat the factual background involved in this suit; suffice it to say that plaintiffs are customers of defendants whose electric rates increased after the incident of March 1979 at the Three Mile Island nuclear power plant. The plaintiffs are seeking to recover damages allegedly incurred as a result of these increased rates. Plaintiffs seek recovery on theories of contract and tort law.

In paragraph H of the complaint it is averred that "Defendants have failed to supply electricity to the Plaintiffs in accordance with the terms of their implied contract in effect on the date of this incident." The only implied contract is that in exchange for electricity to be supplied by certain defendants, plaintiffs will pay a rate set

by the Pennsylvania Public Utilities Commission (PUC) or the New Jersey Board of Public Utility Commissioners (NJBPUC).

In their brief opposing the motion for summary judgment, plaintiffs state:

> (1) Plaintiffs do *not* challenge the propriety of the rates established by the Regulatory Commissions.

In a footnote to the above quoted statement appears the following:

> Plaintiffs discuss below why Commissions had no alternative but to refuse to determine culpability and to set rates at approximately the level they did. Further, plaintiffs entirely agree that the propriety of the rates is not a question for this court, but one within the exclusive jurisdiction of the PUC.

Plaintiffs further note at page 15 of their brief that "they recognize that a failure on the part of these Regulatory Commissions to raise rates to reflect the additional cost of producing and distributing electric power after the accident might have jeopardized the ability of the Utility Company Defendants to provide electric service at all." Plaintiffs also state that they do not seek a refund of those rates in this action. The plaintiffs, nevertheless, claim damages which they assert should be measured by the approved increases in electric rates that would not have occurred but for defendants' wrongful conduct. The plaintiffs' position that the rate increase by the PUC was proper and not disputed and that it was necessary to enable the power companies to continue to supply electricity and on the other hand to claim damages for that rate increase appears logically inconsistent.

Presumably the PUC allowed the increased cost of generating electricity to be passed on to its customers and stockholders to assure a reliable supply of power. If the courts allowed ratepayers to recover those costs in private litigation, utility costs would increase by the

amount of liability imposed. It can be presumed that the PUC would allow those costs to be passed on to the ratepayers again to allow a reliable source of supply. As defendants note[1], the result is entirely circular. Plaintiffs are paying rates lawfully ordered by the PUC or the NJBPUC. Plaintiffs had every opportunity to appeal the order(s) of the PUC or the NJBPUC.

There is no basis for recovery on a theory of implied contract. The cases upon which plaintiffs rely are inapposite to the facts of this case.

Plaintiffs also allege a cause of action based on negligence. The issue between the parties is whether defendants' negligence was the proximate cause of the increased utility rates. (Defendants' negligence is assumed for the purposes of this motion.)

As the magistrate notes, the parties agree that the Restatement (Second) of Torts, §443 has been adopted by Pennsylvania and New Jersey. That section provides that:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
>
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

---

1. Consider the claim that the utilities were negligent: if their negligence caused their costs of generating electricity to increase, presumably the PUC allows that cost to be passed on to customers, to assure a reliable supply of power. If the courts then allowed ratepayers to recover those costs in private litigation, the utilities' cost would go up by the amount of liability so imposed. Once again the PUC would have to allow those costs to be passed on to assure a reliable supply of power. The result is entirely circular. Nor is the principle affected by the presence or absence of insurance, which is also a cost of doing business, ultimately rated on experience, and ultimately borne by the consumer.

> (b) whether the actor's conduct has created a force which is in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
>
> (c) lapse of time.

The question is whether defendants' conduct has created a force which is in continuous and active operation up to the time of harm, or has created a situation harmless unless acted upon by other forces for which defendants are not responsible.

Changes in utility rates can occur by the filing of proposed rate changes by the utility (which may be approved, denied or modified by the PUC, pursuant to 66 Pa. Cons.Stat.Ann. §§1308 and 1310, or at the initiative of the PUC pursuant to 66 Pa.Cons.Stat.Ann. §1309, acting either upon its own motion or upon complaint.

The basic criterion to be applied by the PUC in determining what rates to allow is mandated in 66 Pa.Cons.Stat.Ann. §1301, where the PUC is authorized to ascertain and fix "just and reasonable" rates. As stated by the Supreme Court of Pennsylvania in *PUC v. Pennsylvania Gas and Water Company*, 492 Pa. 326, 337, 424 A.2d 1213, 1219 (1980, reargument denied 1981):

> There is ample authority for the proposition that the power to fix "just and reasonable" rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term "just and reasonable" was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation but rather to confer upon the regulatory body the power to make and apply policy concerning the appropriate balance between prices charged to utility customers and returns on capital to utility investors consonant with constitutional protections applicable to both.

It is clear that the PUC is not a rubber stamp automatically approving rates demanded by the companies. Its power to make and apply policy and the flexibility accorded its regulatory discretion makes it that other force referred to in a "situation harmless unless acted upon by other forces."

The court will not address any arguments with regard to the Price-Anderson Act or the application of the law as espoused in *J'aire Corp. v. Gregory*, 157 Cal.Repts. 407, 598 P.2d 60 (1979). The court is satisfied that defendants' arguments on these issues have merit and were properly treated by the magistrate.

Sylvia H. Rambo
United States District Judge

Dated: August 31, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD A. STIBITZ, et al., *Plaintiff*	:	
v.	:	Civil Action No. 81-0422
GENERAL PUBLIC UTILITIES CORP., et al., *Defendants*	:	

ORDER

Upon independent review of the entire record and the applicable law, IT IS HEREBY ORDERED THAT:

1. The report and recommendation of Magistrate Smyser are adopted.

2. Defendants' motion for summary judgment is granted.

3. The Clerk of the Court is directed to close the file on this action.

Sylvia H. Rambo
United States District Judge

Dated: August 31, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3455

Stibitz, Donald A., New Freedom Lumber Co., Inc., Richard K. Baade and Shirley A. Baade, his wife, Albert C. George and M. Isabel George, his wife, Victor Hebel, P. G. Engineering, Chanceford Manor Village Sewage Co., Inc., Chanceford Manor Village Water Co., Inc., Dorothy S. Hostetter, L. Richard Harner and Linda Harner, his wife, James Barron and Diane Barron, his wife, Margaret Mary Jonas, Cumberland Woodcraft Company, Inc., Pocono Business Furniture, Inc., Forget-Me-Not, Inc., Larry Welker Ford, Inc., Dr. Maxine C. Bush, Rev. Alva Tompkins, Musette Duggan, Wels I. Zimmerman, Harry Wallach, Mary W. Hutchinson, Stephen M. Young, FMG Investments, Inc., Gettysburg Tours, Inc., Heritage Inns, Inc., L. E. Smith Wholesale Distributors, Inc., Individually and on behalf of all others similarly situated,

Appellants

v.

General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power and Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., J. Ray McDermott & Co., Catalytic, Inc., and Burns & Roe, Inc.,

Appellees

Appeal from the United States District Court
for the Middle District of Pennsylvania

D.C. No. 81-0422

Present: SEITZ, *Circuit Judge*, STEWART, *Associate Justice**, and ADAMS, *Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel June 14, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 31, 1983, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk _____
Sally Mrvos

October 24, 1984

---

1. *Honorable Potter Stewart, Associate Justice (retired) of the Supreme Court of the United States, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-3455

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE and SHIRLEY A. BAADE, his wife, et al., etc.,

Appellants,

v.

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER and LIGHT CO., et al., etc.,

Appellees

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 81-0422)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Circuit Judge,* STEWART (Associate Justice),* and ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges.*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

2. *The Honorable Potter Stewart, Associate Justice (retired) of the Supreme Court of the United States, sitting by designation.

circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

42 Pa. Cons. Stat. Ann. §5103 is a matter for the concern of the attorneys and not this court.

By the Court

_____

Circuit Judge

Dated: November 19, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3455

STIBITZ, DONALD A., et al.,

Appellants

v.

GENERAL PUBLIC UTILITIES CORP., et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 26, 1984, with the understanding that a petition for writ of certiorari will be filed on or before that date.

Circuit Judge

Dated: December 11, 1984

TO
U.S. COURT OF APPEALS, THIRD CIRCUIT

U.S. DISTRICT COURT Middle District of Pennsylvania Harrisburg

U.S. TAX COURT [ ] CIRCUIT COURT
DOCKET NO. _____

FULL CAPTION IN DISTRICT COURT AS FOLLOWS:

See attached sheet.

DISTRICT or
TAX COURT
DOCKET NO. C.A. No. 81-0422
DISTRICT or
TAX COURT
JUDGE *Rambo*

Certified from the record

Date: September 31, 1983
Donald R. Berry, Clerk
Per
Deputy Clerk

Notice is hereby given that the above-named Plaintiffs appeals to the United States Court of Appeals for the Third Circuit from [ ] Judgment [x] Order [ ] Other (Specify)

entered in this action on August 31, 1983

DATED: 9/20/83

(Counsel for
Appellant-Signature)
Lee C. Swartz
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See attached sheet for additional attorneys.

NOTE: USE ADDITIONAL SHEETS if all appellants and/or all counsel for appellees cannot be listed on the notice of appeal sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DONALD A. STIBITZ,	:	
NEW FREEDOM LUMBER CO., INC.,	:	
RICHARD K. BAADE and	:	
SHIRLEY A. BAADE, his wife,	:	
ALBERT C. GEORGE and	:	
M. ISABEL GEORGE, his wife,	:	
VICTOR HEBEL,	:	
P. G. ENGINEERING,	:	
CHANCEFORD MANOR VILLAGE SEWAGE CO., INC.,	:	
CHANCEFORD MANOR VILLAGE WATER CO., INC.	:	
DOROTHY S. HOSTETTER,	:	
L. RICHARD HARNER and	:	
LINDA HARNER, his wife,	:	
JAMES BARRON and	:	
DIANE BARRON, his wife,	:	
MARGARET MARY JONAS,	:	
CUMBERLAND WOODCRAFT COMPANY, INC.,	:	
POCONO BUSINESS FURNITURE, INC.,	:	CLASS ACTION NO. 81-0422
FORGET-ME-NOT, INC.,	:	
LARRY WELKER FORD, INC.	:	
DR. MAXINE C. BUSH,	:	JURY TRIAL
REV. ALVA TOMPKINS,	:	DEMANDED
MUSETTE DUGGAN,	:	
WELS I. ZIMMERMAN,	:	
HARRY WALLACH,	:	
MARY W. HUTCHINSON,	:	
STEPHEN M. YOUNG,	:	
FMG INVESTMENTS, INC.,	:	
GETTYSBURG TOURS, INC.,	:	
HERITAGE INNS, INC.,	:	
L. E. SMITH WHOLESALE DISTRIBUTORS, INC.,	:	
Plaintiffs,	:	
Individually and on behalf of all others similarly situated	:	
	:	
v.	:	
	:	

GENERAL PUBLIC UTILITIES CORP. :
METROPOLITAN EDISON CO., :
JERSEY CENTRAL POWER & :
LIGHT CO. :
PENNSYLVANIA ELECTRIC CO., :
BABCOCK & WILCOX COMPANY, :
J. RAY McDERMOTT & CO., :
CATALYTIC, INC., :
BURNS & ROE, INC., :
Defendants :

CLASS ACTION COMPLAINT

Plaintiffs, by their attorneys, bring these civil actions, on their own behalf and on behalf of the classes they represent, to obtain damages, equitable relief, and the costs of suit from the Defendants named herein, and complain and allege as follows:

I.
CAUSES OF ACTION

1. These are actions for damages and equitable relief arising under principles of federal common law; under the Act of August 30, 1954, 68 Stat. 921, 42 U.S.C. §2011 *et seq.* as amended, popularly known as the Atomic Energy Act, including the Act of September 2, 1957, P.L. No. 85-256, 71 Stat. 576, 42 U.S.C. §2210 as amended, popularly known as the Price-Anderson Act, and under the law of the Commonwealth of Pennsylvania, in order to obtain redress for Plaintiffs and members of the Plaintiff classes from Defendants for injuries and damages arising out of a nuclear incident, to wit: that which occurred at the Three Mile Island nuclear electric generating facility in Dauphin County, Pennsylvania, on, about and after March 28, 1979.

II.
JURISDICTION AND VENUE

2. This complaint is filed and these proceedings are instituted under the Price-Anderson Act, 42 U.S.C. §2210, under 28 U.S.C. §§1331 and 1337, and more specifically, 28 U.S.C. §1337(a).

3. This Court has jurisdiction of the subject matter, and venue is proper under 28 U.S.C. §§1331 and 1337 and 42 U.S.C. §2210. The Plaintiffs and all members of the class are users of electricity supplied by the utility company Defendants.

III.
PARTIES

4. Plaintiffs:

A. Donald A. Stibitz is an adult individual residing at 48 Seminary Avenue, Reading, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and lives more than twenty-five miles from Three Mile Island.

B. New Freedom Lumber Company, Inc., is a Pennsylvania corporation engaged in the lumber supply business, with its offices at New Freedom, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

C. Richard K. Baade and Shirley A. Baade, his wife, are adult individuals residing at New Freedom, Pennsylvania. Said Plaintiffs receive electricity supplied by Defendant Met Ed and live more than twenty-five miles from Three Mile Island.

D. Albert C. George and M. Isabel George, his wife, are adult individuals residing at New Freedom, Pennsylvania. Said Plaintiffs receive electricity sup-

plied by Defendant Met Ed and live more than twenty-five miles from Three Mile Island.

E. Victor Hebel is an adult individual residing at R.D.#2, Stewartstown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and lives more than twenty-five miles from Three Mile Island.

F. P. G. Engineering is a partnership in the business of providing engineering services, with offices at R.D.#2, Stewartstown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

G. Chanceford Manor Village Sewage Company, Inc., is a Pennsylvania corporation in the business of processing sewage, with its principal office at Stewartstown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

H. Chanceford Manor Village Water Company, Inc., is a Pennsylvania corporation in the business of supplying water service, with its principal office at Stewartstown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

I. Dorothy S. Hostetter is an adult individual residing at Box 23, McSherrystown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and lives more than twenty-five miles from Three Mile Island.

J. L. Richard Harner and Linda Harner, his wife, are adult individuals residing at R.D.#4, Box 310, Hanover, Pennsyvlania. Said Plaintiffs receive elec-

tricity supplied by Defendant Met Ed and live more than twenty-five miles from Three Mile Island.

K. James Barron and Diane Barron, his wife, are adult individuals residing at R.D.#1, Dingmans Ferry, Pennsylvania. Said Plaintiffs receive electricity supplied by Defendant Met Ed and live more than twenty-five miles from Three Mile Island.

L. Margaret Mary Jonas is an adult individual residing at Box 84, Dingmans Ferry, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and lives more than twenty-five miles from Three Mile Island.

M. Cumberland Woodcraft Company, Inc., is a Pennsylvania corporation in the business of woodcraft work, with its principal office at 2500 Walnut Bottom Road, Carlisle, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and has offices more than twenty-five miles from Three Mile Island.

N. Pocono Business Furniture, Inc., is a Pennsylvania corporation in the business of supplying furniture, with its principal office at 406 Main Street, Stroudsburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed and has offices more than twenty-five miles from Three Mile Island.

O. Forget-Me-Not, Inc., is a Pennsylvania corporation in the business of supplying gift items, with its principal office at Shippensburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Pennsylvania Electric, and its offices are more than twenty-five miles from Three Mile Island.

P. Larry Welker Ford, Inc., is a Pennsylvania corporation in the business of selling automobiles, with its principal office at 204 East King Street, Ship-

pensburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Pennsylvania Electric, and its offices are more than twenty-five miles from Three Mile Island.

Q. Dr. Maxine C. Bush is an adult individual residing at R.D.#2, Box 76, Mehoopany, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Pennsylvania Electric and lives more than twenty-five miles from Three Mile Island.

R. Reverend Alva Tompkins is an adult individual residing at R.D.#2, Box 2, Tunkhannock, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Pennsylvania Electric and lives more than twenty-five miles from Three Mile Island.

S. Musette Duggan is an adult individual who resides and operates a business at Route 1, Box 111, Sayre, Pennsylvania. Said Plaintiff receives electricity from the Claverack Rural Electric Cooperative, which receives its electricity from Pennsylvania Electric, and lives more than twenty-five miles from Three Mile Island.

T. Wels I. Zimmerman is an adult individual who resides at 20 Spring Street, Lewistown, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Pennsylvania Electric and lives more than twenty-five miles from Three Mile Island.

U. Harry Wallach is an adult individual residing at 44 Patton Lane, Long Beach, New Jersey. Said Plaintiff receives electricity supplied by Defendant Jersey Central and lives more than twenty-five miles from Three Mile Island.

V. Mary W. Hutchinson is an adult individual residing at 69 Hilltop Trail, Sparta, New Jersey. Said Plaintiff receives electricity supplied by Defendant

Jersey Central and lives more than twenty-five miles from Three Mile Island.

W. Stephen M. Young is an adult individual residing at 253 Route 46, Mine Hill, New Jersey. Said Plaintiff receives electricity supplied by Defendant Jersey Central and lives more than twenty-five miles from Three Mile Island.

X. FMG Investments, Inc., is a Pennsylvania corporation, with its principal office located in Gettysburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

Y. Gettysburg Tours, Inc., is a Pennsylvania corporation, with its principal office located in Gettysburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

Z. Heritage Inns, Inc., is a Pennsylvania corporation, with its principal office located in Gettysburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

AA. L. E. Smith Wholesale Distributor, Inc., is a Pennsylvania corporation, with its principal office located in Gettysburg, Pennsylvania. Said Plaintiff receives electricity supplied by Defendant Met Ed, and its offices are more than twenty-five miles from Three Mile Island.

5. The Utility Company Defendants are:

A. General Public Utilities Corporation ("GPU"), a public utility holding company. GPU is the parent company of Metropolitan Edison Co. ("Met Ed"), an-

other Defendant herein. GPU's principal offices are located at 260 Cherry Hill Road, Parsippany, New Jersey, 07054.

B. Metropolitan Edison Company ("Met Ed"), a corporation engaged in the production and sale of electricity. Met Ed is a subsidiary of GPU, is a 50% owner of the Three Mile Island nuclear powered electric generating facility and is the operator of that facility. Met Ed's principal offices are located at Post Office Box 542, Reading, Pennsylvania, 19703.

C. Jersey Central Power & Light Company ("Jersey Central"), a corporation engaged in the business of producing and selling electricity. Jersey Central is a subsidiary of GPU and is a 25% owner of the Three Mile Island nuclear powered electric generating facility. Jersey Central's principal offices are located at Madison and Punchbown, Morristown, New Jersey.

D. Pennsylvania Electric Company ("Pennsylvania Electric"), a corporation engaged in the business of producing and selling electricity. Pennsylvania Electric is a subsidiary of GPU and is a 25% owner of the Three Mile Island nuclear powered electric generating facility. Its principal offices are located at 1001 Broad Street, Johnstown, Pennsylvania, 15907.

6. The other Defendants are:

A. Babcock and Wilcox Company ("Babcock"), a subsidiary of J. Ray McDermott & Co. Babcock is in the business, *inter alia,* of designing and constructing nuclear powered electric generating facilities, and did so with respect to the Three Mile Island facility. Babcock is a New Jersey corporation, with its principal office at 161 East 42nd Street, New York, New York, 10017.

B. J. Ray McDermott & Company ("McDermott"), the parent and controlling company

of Babcock, is a Delaware corporation. McDermott's principal offices are located at 1010 Common Street, New Orleans, Louisiana, 70112.

C. Catalytic, Inc. ("Catalytic"), the corporation responsible for maintenance of the Three Mile Island facility. Catalytic's principal offices are at 1500 Market Street, Philadelphia, Pennsylvania.

D. Burns & Roe, Inc. ("B & R"), the corporation responsible for engineering, design, quality assurance, start-up and testing, among other things, in portions of the Three Mile Island facility. B & R's principal offices are located at 550 Kinderkamack Road, Oradell, New Jersey, 07649.

IV.
CLASS ACTION ALLEGATIONS

7. Plaintiffs bring these actions on behalf of themselves and, under Rule 23 of the Federal Rules of Civil Procedure, as representatives of the class defined herein:

The class consists of all individuals, cooperatives, proprietorships, partnerships, corporations, institutions and other business and professional entities who are users of electricity supplied by utility company Defendants and who have suffered economic harm by way of increased costs of electric power as a result of the nuclear incident which is the subject of this complaint, excluding the Defendants themselves, and who reside and/or do business at a distance greater than twenty-five miles from Three Mile Island. Plaintiffs are presently unable to state the precise size of the class, which numbers in the thousands. The class is sufficiently numerous that joinder of all its members is impracticable.

8. Plaintiffs will fairly and adequately protect the interests of the respective classes. In each class, the interests of the class representatives are coincident with, and not antagonistic to, those of the remainder of the class. In

addition, Plaintiffs are represented by experienced and able counsel who have litigated class actions in this District, other courts, and have been involved in other Three Mile Island litigation.

9. Common questions of law and fact exist with respect to the nuclear incident which is the subject of this complaint. The only possible individual question affecting individual members of the classes is the precise amount of damages to which each member of the classes is entitled.

10. Because the only non-common issue is the amount of individual damages to each particular class member, common questions of law and fact plainly predominate. Class action treatment is a superior method for the fair and efficient adjudication of the controversy herein described, because it permits a large number of injured persons, joinder of whom is impracticable, to prosecute their common claims in a single forum simultaneously and without unnecessary duplication. The class action provides an efficient method whereby the enforcement of the rights of Plaintiffs, the class members, and the Defendants can be fairly managed.

V.
NUCLEAR INCIDENT DEFINED

11. A "nuclear incident", as used in this complaint, is defined to mean any occurrence, including an extraordinary nuclear occurrence, within the United States causing loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material, as set forth in 42 U.S.C. §2014(q). A "nuclear incident" can also result, as it did in this case, in greatly increased electrical rates to the Plaintiffs, thereby causing Plaintiffs to suffer substantial economic damages. Furthermore, a nuclear incident can also result, as it did in this case, in the ina-

bility of Defendants to provide electrical service in accordance with their implied contract in effect on the date of the incident.

VI.
VIOLATIONS ALLEGED

12. On or about March 28, 1979, and continuing thereafter, at least until the date of filing of this complaint, a nuclear incident occurred at the Three Mile Island facility.

13. As a result of that nuclear incident, TMI Units No. 1 and No. 2, two facilities used for the generation of electricity by utility company Defendants, have been damaged and/or shut down as a result of the actions of Defendants set forth in paragraph 16 below. The damage and/or shutdown of these facilities has caused the utility company Defendants to incur substantial expenses that would not have been incurred but for the accident. The Pennsylvania and New Jersey Public Utility Commissions (PUC) have determined that some or all of these costs must be passed through to the Plaintiffs in order to maintain continuing electricity to the utility company Defendants' service area. The pass through of these costs has caused the Plaintiffs to suffer substantial damages. The PUC has not and cannot determine the culpability and/or liability of Defendants for these damages under applicable provisions of either state or federal law, including tort law and the Price-Anderson Act (42 U.S.C. §2210 et seq.), nor does state or federal law permit or authorize the PUC to award damages to Plaintiffs in actions of this nature.

14. As a result of the nuclear incident, Defendants have failed to supply electricity to Plaintiffs in accordance with the terms of their implied contract in effect on the date of the incident. Thus, Defendants have breached their contract with Plaintiffs, and Plaintiffs have suffered substantial damages as a result thereof. The PUC has

not and cannot determine the culpability and/or liability of Defendants for these damages under applicable provisions of either state or federal law, including contract law and the Price-Anderson Act (42 U.S.C. §2210 et seq.), nor does state or federal law permit or authorize the PUC to award damages to Plaintiffs in actions of this nature.

15. Plaintiffs aver that the aforesaid incident at Three Mile Island will continue to require them to pay substantially higher costs for electrical service supplied by Defendants than would have had to be paid but for the acts of the Defendants set forth in paragraph 16 below.

VII.
CAUSES OF VIOLATIONS ALLEGED

16. The nuclear incident was foreseeably and proximately caused by the following acts of the Defendants, either singly or in combination:

(a) negligence, recklessness, willful and wanton misconduct in the design, manufacture and/or construction of the Three Mile Island nuclear facility and training of the personnel associated therewith;

(b) negligence, recklessness, willful and wanton misconduct in the operation of the Three Mile Island nuclear facility;

(c) negligence, recklessness, willful and wanton misconduct in the maintenance of the Three Mile Island nuclear facility;

(d) the miscarriage of an ultrahazardous activity, namely, the activity of operating a nuclear facility; and

(e) the violation of statutes, regulations and the terms and conditions of the license issued by the United States Nuclear Regulatory Commission for the Three Mile Island nuclear facility, which license (and the statute requiring its issuance) was intended

to protect and benefit individuals and businesses within the vicinity of such facility, including the Plaintiffs and the class members.

(f) defects in the design, manufacture, construction and/or installation of the nuclear reactor at the Three Mile Island nuclear facility, in violation of Pennsylvania law, as reflected in Restatement (Second) of Torts, §402A.

VIII.
EFFECTS OF VIOLATIONS ALLEGED

17. The nuclear incident has had, *inter alia*, the following effects:

(a) TMI Unit No. 1, the undamaged unit located on Three Mile Island, was closed and remains closed to this day. Plaintiffs are unable to determine when, if ever, TMI No. 1 will reopen.

(b) TMI Unit No. 2, the damaged unit, was severely damaged and remains closed today. Based upon information made public by Defendants, it will be at least seven (7) years before TMI No. 2 can be repaired. Plaintiffs are unable to aver with certainty when, if ever, TMI No. 2 will be reopened.

(c) Plaintiffs have suffered, and continue to suffer, economic loss as a result of the closing of TMI No. 1 and TMI No. 2, in that their electric utility costs are substantially higher than they would have been but for the violations set forth hereinabove.

IX.
DAMAGES TO PLAINTIFFS AND THE MEMBERS OF THE CLASSES

18. As a direct and proximate result of the violations alleged, Plaintiffs and members of the Plaintiff classes

have suffered, are suffering and will continue to suffer the following loss and damage:

(a) Individual Plaintiffs and class members have had to pay electric power costs substantially higher than they would have been required to pay if the violations set forth hereinabove had not occurred.

(b) Plaintiffs and class members have suffered other "consequential and incidental" damages as a result of the violations alleged hereinabove.

X.
JURY TRIAL DEMAND

19. Plaintiffs demand a trial by jury of all issues so triable in these cases.

XI.
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that:

A. Plaintiffs and other members of the classes recover the damages determined to have been sustained by each of them respectively, and that judgment be entered herein jointly and severally against the Defendants, and each of them, for the amounts determined.

B. This Court grant such other, further and different relief as may be deemed just and proper.

C. Plaintiffs and members of the classes recover the costs of this suit, including any expert witness fees, together with reasonable attorneys' fees.

D. This Court award such exemplary damages as are appropriate under the circumstances.

Respectfully submitted,
HEPFORD, SWARTZ, MENAKER & WILT

By:_____

Lee C. Swartz
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By:_____

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STOCK & LEADER

By:_____

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WIDOFF, REAGER, SELKOWITZ & ADLER, P.C.

By:_____
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By:_____
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APPEARANCE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DONALD A. STIBITZ, *et al.*,	:	
	:	No. 83-3455
vs.	:	
GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER & LIGHT COMPANY, PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX COMPANY, J. RAY McDERMOTT & CO., CATALYTIC, INC.	:	

The Clerk will enter my appearance for the Appellees General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Company, Pennsylvania Electric Co., Babcock & Wilcox Company, J. Ray McDermott & Co., Catalytic, Inc.

(sign)_____

John G. Harkins, Jr.
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Corporate Disclosure and
Financial Interest Statement
For All Appellees in No. 83-3455

As to the named appellees, the following is the only corporate disclosure required under Local Rule 25:

Catalytic, Inc. is a wholly-owned subsidiary of Air Products & Chemicals, Inc.

As to financial interests, the following explanation is provided as to all appellees. This litigation arises out of the nuclear accident at Three Mile Island in March, 1979. Under the Price-Anderson Act Amendments to the Atomic Energy Act, various layers of insurance and indemnity were provided for by Congress.

Under the Price-Anderson Act, the initial layer of coverage is through $140,000,000.00 of insurance provided by a consortium of companies. $108,500,000.00 of this insurance coverage is provided by a pool of stock insurance companies known as American Nuclear Insurers ("ANI"). A list of the participating member companies of ANI, with their respective share of participation, is attached as Appendix "A". The remaining $31,500,000.00 is provided by a pool of mutual insurance companies known as Mutual Atomic Energy Liability Underwriters ("MAELU"). The participating members with their respective shares are as follows:

Company	Share
American Mutual Liability Insurance Company	15%
Employers Insurance of Wausau, A Mutual Company	15%
Liberty Mutual Insurance Company	30%
Lumberman's Mutual Insurance Company	30%
Michigan Mutual Insurance Company	5%
Sentry Insurance, A Mutual Company	5%

The MAELU coverage ($31,500,000.00) is 100% reinsured through American Mutual Reinsurance Com-

pany. American Mutual has in turn reinsured this full amount through approximately one hundred (100) mutual insurance companies.

The secondary level of insurance is provided through a retrospective rate plan in which every licensed reactor owner must participate. Each licensee is theoretically liable up to a maximum amount of $5,000,000.00 per reactor or $10,000,000.00 per utility. A list of these licensees is attached as Appendix "B".

The third and final layer of "financial protection" is the United States, which will by the terms of the Act indemnify "persons liable" (as defined in the Act) to the extent of the difference between sums available from the primary and secondary insurance layers described above and the total limit of liability (as of 1979) of $560,000,000.00.

SUBSCRIBING COMPANIES	PROPORTION OF 100%
Aetna Casualty and Surety Co., Inc., 151 Farrington Ave., Hartford, CT 06156	10.114078
Aetna Insurance Company, 55 Elm St., Hartford, CT 06115	2.528520
Allstate Insurance Co., Allstate Plaza, Northbrook, IL 60062	4.214199
American Home Assurance Co., 102 Maiden La., New York, NY 10005	.854922
American Motorists Insurance Co., Long Grove, IL 60049	.421420
Bituminous Casualty Corporation, 320 18th St., Rock Island, IL 61201	.421420
Centenial Insurance Co., 45 Wall St., New York, NY 10005	.579452
Commercial Union Insurance Co., One Beacon St., Boston, MA 02106	3.034224
Connecticut Indemnity Company, Inc., 1000 Asylum Ave., Hartford, CT 06101	1.011408

Continental Casualty Co., CNA Plaza, Chicago, IL 60685	4.214199
Continental Insurance Co., The, 80 Maiden La., New York, NY 10035	6.742719
Federal Insurance Co., 51 John F. Kennedy Pkwy., Short Hills, NJ 07078	1.517112
Fireman's Fund Insurance Co., 3333 California St., San Francisco, CA 94119	5.057039
General Accident Fire and Life Assurance Corp., Ltd., Fourth & Walnut Sts., Philadelphia, PA 19105	1.348544
Great American Insurance Co., 580 Walnut St., Cincinnati OH 45201	1.348544
Hanover Insurance Co., The, 440 Lincoln St., Worcester, MA 01605	.505704
Hartford Accident and Indemnity Co., Hartford Plaza, Hartford, CT 06115	7.164139
Hartford Steam Boiler Inst. & Ins. Co., The, 59 Prospect St., Hartford, CT 06102	.505704
Home Indemnity Co., The, 59 Maiden La., New York, NY 10028	3.708495
Insurance Co. of North America, 1600 Arch Street, Philadelphia, PA 19101	3.371359
Monarch Insurance Co. of Ohio, The, 19 Rector St., New York, NY 10006	.337136
Northern Insurance Company of New York, 59 John Street, New York, NY 10038	1.854248
Northwestern National Ins. Co., 731 No. Jackson St., Milwaukee, WI 53201	.674272
Ohio Casualty Insurance Company, The, 136 North Third St., Hamilton, OH 45025	.168568
Pacific Indemnity Co., 3200 Wilshire Blvd., Los Angeles, CA 90010	.337136
Peerless Insurance Co., 62 Maple Ave., Keene, NH 03431	.126426
Phoenix Assurance Co. of New York, 80 Maiden La., New York, NY 10036	.506704

Protective Insurance Co., 3100 No. Meridian St., Indianapolis, IN 46208	.168568
Providence Washington Insurance Co., 20 Washington Place, Providence, RI 02903	.106365
Puritan Insurance Company, 1515 Summer St., Stamford, CT 06905	.252862
Reliance Insurance Company, 4 Penn Center Plaza, Philadelphia, PA 19103	1.491527
Royal Globe Insurance Company, 150 William Street, New York, NY 10035	3.371359
St. Paul Fire & Marine Ins. Co., 355 Washington St., St. Paul, MN 55102	4.773645
Seaboard Surety Co., 90 William St., New York, NY 10038	.412420
State Farm Fire & Casualty Company, 112 East Washington St., Bloomington, IL 61701	.542840
Transamerica Insurance Co., 150 So. Olive St., Los Angeles, CA 90015	.542840
Travelers Indenmity Company, The, One Tower Square, Hartford, CT 061154	10.956917
United States Fidelity and Guaranty Co., 100 Light Street, Baltimore, MD 21202	10.114078
United States Fire Insurance Co., Madison Ave., at Canfield Rd., Morristown, NJ 07950	2,657088
Zurich Insurance Co., 111 West Jackson Blvd., Chicago, IL 60604	1.264260

Appendix "B"

SECONDARY FINANCIAL PROTECTION POLICIES EFFECTIVE AS OF MARCH 25, 1979

BINDER NO.	NAMED INSURED	UTILITY
1. EB-1	Commonwealth Edison Company	Dresden I
2. EB-2	Commonwealth Edison Company	Dresden II
3. EB-3	Commonwealth Edison Company	Dresden III
4. EB-4	Yankee Atomic Electric Company	Yankee Nuclear
5. EB-5	Consolidated Edison Company of New York, Inc.	Indian Point I
6. EB-6	Consolidated Edison Company of New York, Inc.	Indian Point II
7. EB-7	Power Authority of the State of New York	Indian Point III
8. EB-8	Philadelphia Electric Company, Public Service Electric & Gas Company, Delmarva Power & Light Co., and Atlantic City Electric Company	Peach Bottom III
9. EB-9	Philadelphia Electric Company, Public Service Electric & Gas Company, Delmarva Power & Light Co., and Atlantic City Electric Company	Peach Bottom III
10. EB-10	Southern California Edison Company and/or San Diego Gas & Electric Company	San Onofre I
11. EB-11	Connecticut Yankee Atomic Power Company	Haddam Neck
12. EB-12	Niagara Mohawk Power Corporation	Nine Mile Point
13. EB-13	Jersey Central Power & Light Company	Oyster Creek

14.	EB-14	Rochester Gas & Electric Corporation	Robert Emma
15.	EB-15	The Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, and Northeast Nuclear Energy Co.	Millstone I
16.	EB-16	The Connecticut Light & Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company, and Northeast Nuclear Energy Co.	Millstone II
17.	EB-17	Northern States Power Company	Monticello
18.	EB-18	Wisconsin Electric Power Company	Point Beach I
19.	EB-19	Wisconsin Electric Power Company	Point Beach II
20.	EB-20	Consumers Power Company	Palisades
21.	EB-21	Carolina Power & Light Company	H. B. Robinson
22.	EB-22	Duke Power Company	Oconee I
23.	EB-23	Duke Power Company	Oconee II
24.	EB-24	Duke Power Company	Oconee III
25.	EB-25	Florida Power & Light Company	Turkey Point III
26.	EB-26	Florida Power & Light Company	Turkey Point IV
27.	EB-27	Virginia Electric & Power Company	Surry I
28.	EB-28	Virginia Electric & Power Company	Surry II
29.	EB-29	Commonwealth Edison Company	Quad Cities I
30.	EB-30	Commonwealth Edison Company	Quad Cities II

31. EB-31	Boston Edison Company	Pilgrim Nuclear
32. EB-32	Vermont Yankee Nuclear Power Corp.	Vermont Yankee
33. EB-33	Public Service Company of Colorado	Fort St. Vrain
34. EB-34	Maine Yankee Atomic Power Company	Maine Yankee
35. EB-35	Florida Power Corporation et al.	Crystal River II
36. EB-36	Northern States Power Company	Prairie Island
37. EB-37	Northern States Power Company	Prairie Island
38. EB-38	Tennessee Valley Authority	Browns Ferry I
39. EB-39	Tennessee Valley Authority	Browns Ferry II
40. EB-40	Tennessee Valley Authority	Browns Ferry II
41. EB-41	Nebraska Public Power District	Cooper
42. EB-42	Commonwealth Edison Company	Zion I
43. EB-43	Commonwealth Edison Company	Zion II
44. EB-44	Wisconsin Public Service Corporation	Kewaunee
45. EB-45	Indiana & Michigan Electric Company	Donald C. Oggs
46. EB-46	Omaha Public Power District	Ft. Calhoun
47. EB-47	Power Authority of the State of New York	James A. Fitz-patrick
48. EB-48	Arkansas Power & Light Company	Arkansas Nuclear
49. EB-49	Sacramento Municipal Utility District	Rancho Seco

50.	EB-50	Iowa Electric Light and Power Company, Central Iowa Power Cooperative and Corn Belt Power Cooperative	Duane Arnold
51.	EB-51	Georgia Power Company, Ogelthorpe Electric Membership Corp., Municipal Electric Authority of Georgia and City of Dalton, Georgia	
52.	EB-52	Baltimore Gas & Electric Company	Calvert Cliffs I
53.	EB-53	Baltimore Gas & Electric Company	Calvert Cliffs II
54.	EB-54	Carolina Power & Light Company	Brunswick Steam
55.	EB-55	Carolina Power & Light Company	Brunswick Steam
56.	EB-56	Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company	Three Mile Island
57.	EB-57	Portland General Electric Company, Eugene Water and Electric Board and Pacific Power and Light Company	Trojan
58.	EB-58	Duquesne Light Company, Ohio Edison Company and Pennsylvania Power Company	Beaver Valley I
59.	EB-59	Florida Power & Light Company	St. Lucie
60.	EB-60	Public Service Electric & Gas Company, Philadelphia Electric Company, Delmarva Power & Light Co., Atlantic City Electric Company	Salem I
61.	EB-61	Toledo Edison Company	Davis-Besse

62. EB-62	Alabama Power Company	Joseph M. Farley
63. EB-63	Virginia Electric and Power Company	North Anna J.
64. EB-64	Indiana & Michigan Electric Company	Donald C. Cook II
65. EB-65	Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company	Three Mile Island
*EB-66		
67. EB-67	Georgia Power Company, Ogelthorpe Power Corporation, Municipal Electric Authority of Georgia and City of Dalton, Georgia	Edwin I. Hatch
68. EB-68	Arkansas Power & Light Company	Arkansas Nuclear

*EB-66 was not in effect at this time.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE THREE MILE ISLAND LITIGATION	:	CIVIL ACTION
STIBITZ, et al.	:	No. 81-0422

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, pursuant to Rule 56 F.R.Civ.P., hereby move for summary judgment dismissing plaintiffs' complaint with prejudice and entering final judgment in favor of all defendants. The grounds for the Motion are as set forth in the attached affidavit of Fred D. Hafer, incorporated herein by reference, and the accompanying "Memorandum In Support Of Defendants' Motion for Summary Judgment."

JOHN G. HARKINS, JR.
EDWARD W. MADEIRA, JR.
A. H. WILCOX
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Harrisburg, PA 17108
(717) 233-8483

Attorneys for Defendants

STATE OF NEW JERSEY:

ss. :

COUNTY OF MORRIS :

FRED D. HAFER, being duly sworn according to law, upon oath says:

1. I am Vice President, Rate Case Management, of GPU Service Corporation with overall responsibility for rate matters for the three GPU System operating companies, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company. As such, I am authorized to make this affidavit on behalf of General Public Utilities Corporation and the three GPU System operating companies.

2. Metropolitan Edison Company and Pennsylvania Electric Company are both public utilities regulated by the Pennsylvania Public Utility Commission. Jersey Central Power & Light Company is a public utility regulated by the New Jersey Board of Public Utility Commissioners. In each case, such regulation includes regulation of the retail rates which are to be charged for electric consumption.

3. Operation of the Three Mile Island Station Units 1 and 2 is subject to regulation by the United States Nuclear Regulatory Commission. Unit 2 was damaged in the March 28, 1979 accident, and the cleanup effort there is expected to span the next several years. Unit 1, which was shut down for routine refueling at the time of the Unit 2 accident, has been held out of service pending the completion of NRC safety hearings. To the best of my knowledge there are also several other factors affecting the Unit 1 restart timetable: a court decision ordering the NRC to consider the possible effect of psychological stress related to Unit 1's restart on local residents, repairs to the unit's steam generators, and completion of modifications required by the NRC as a result of lessons learned from the Unit 2 accident. From a strictly technical standpoint, I understand that Unit 1 restart appears feasible by the

end of 1982, and that the court decision regarding psychological stress may be controlling TMI-1's restart timetable.

4. Attached hereto are three schedules, one each by Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company. Each of these schedules was prepared under my supervision and reflects the average annualized rate per kWh of retail sales in effect on the dates shown.

5. The rates shown on the attached schedules are to the best of my knowledge, information and belief the average annualized rate per kWh of retail sales charged by the three GPU System operating companies to their retail customers on the dates shown. In the interim between the major rate changes shown on the attached schedules, minor changes in the average annualized rate per kWh of retail sales of Metropolitan Edison Company and Pennsylvania Electric Company occurred as a result of changes in their Tax Adjustment Surcharges which are revised periodically pursuant to the Pennsylvania Public Utility Commission's State Tax Adjustment Procedure Order, dated March 10, 1970.

/s/ F. D. HAFER
F. D. Hafer

Sworn and Subscribed to
before me this 2nd day
of August, 1982

/s/ MILDRED MISURA (Seal)
Mildred Misura
Notary Public of New Jersey
My Commission Expires June 16, 1987

METROPOLITAN EDISON COMPANY
SUMMARY OF POST ACCIDENT RETAIL RATES[1]
THROUGH MARCH 1982

PaPUC Order Docket	Base Rate/ Energy Clause Charge	Total Annual Retail Change Allowed ($ Millions)	Effective Date	Average Annualized Rate per Kwh of Retail Sales (c/Kwh)
I-79040308 (Phase I)	Energy Clause	$44.6	7/1/79	4.55
I-79040308 (Phase II)	Energy Clause	$54.6	3/1/80	5.24
I-79040308 (Phase II)	Base Rate and Energy Clause	$59.2	6/1/80	5.87
M-FACE8104	Energy Clause	$ (1.3)	1/1/81	5.85
R-80051196	Base Rate and Energy Clause	$22.3	4/9/81	6.22
M-810294	Energy Clause	$23.7	1/1/82	6.52
R-811601	Base Rate	$71.7	1/14/82	7.50

(1) The average annualized rate per Kwh of retail sales immediately prior to the TMI-2 accident (March 1979) was 3.98¢/Kwh.

PENNSYLVANIA ELECTRIC COMPANY
SUMMARY OF POST ACCIDENT RETAIL RATES[1]
THROUGH MARCH 1982

PaPUC Order Docket	Base Rate/ Energy Clause Charge	Total Annual Retail Change Allowed ($ Millions)	Effective Date	Average Annualized Rate per Kwh of Retail Sales (c/Kwh)
C-79040864	Base Rate	$(25.0)	4/25/79	4.25
I-79040864 (Phase I)	Energy Clause	$36.2	7/1/79	4.59
I-79040308 (Phase II)	Base Rate and Energy Clause	$14.4	6/1/80	4.73
M-FACE8108	Energy Clause	$ (2.0)	1/1/81	4.71
R-80051197	Base Rate	$54.6[2]	4/9/81[2]	5.27
M-810294	Energy Clause	$76.8	1/1/82	5.97
R-811602	Base Rate	$48.9	1/14/82	6.45

(1) The average annualized rate per Kwh of retail sales immediately prior to the TMI-2 accident (March 1979) was 4.53¢/Kwh.

(2) Reflects $.5 million increase to correct error in 4/9/81 Order which was not effective until 7/30/81.

JERSEY CENTRAL POWER & LIGHT COMPANY
SUMMARY OF POST ACCIDENT RETAIL RATES[1]
THROUGH MARCH 1982

NJ BPU Order Docket	Base Rate/ Energy Clause Charge	Total Annual Retail Change Allowed ($ Millions)	Effective Date	Average Annualized Rate per Kwh of Retail Sales (c/Kwh)
795-427 (I)	Base Rate and Energy Clause	$ 45.0	7/9/79	5.22
797-643	Energy Clause	$ 70.0	9/6/79	5.77
801-45 (I)	Energy Clause	$ 84.2	3/6/80	6.45
801-45 (II)	Energy Clause	$ 34.2	4/1/80	6.78
811-25	Energy Clause	$ 85.1	4/23/81	7.60
804-285	Base Rate	$109.2	7/31/81	8.42

(1) The average annualized rate per Kwh of retail sales immediately prior to the TMI-2 accident (March 1979) was 4.88¢/Kwh.

Title 42
United States Code

§2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub.L.88—489, §1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under condi-

tions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub.L.88—489, §2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

§2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal

purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial, and which the Commission determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Commission that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Commission shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this

subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Commission indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(l) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to his obligations under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Commission with respect to any obligation undertaken by it in an indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for cooperation.

(o) The term "Joint Committee" means the Joint Committee on Atomic Energy.

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property,

arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further,* that as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Commission to another person licensed by the Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nu-

clear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Commission or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident, except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in section 2210(a), (c), and (k) of this title, claims for loss of, or damage to, or loss of use of property which is lo-

cated at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

§2210. Indemnification and limitation of liability

(a) Financial protection for public liability claims; indemnification agreement; waiver of immunity

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093 or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

(b) Financial protection; amount and type; promulgation of rules, regulations and orders by Commission; deferred premium charges; determination of terms and conditions applicable to licensees

The amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (1) the cost and terms of private insurance, (2) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (3) the nature and purpose of the licensed activity; *Provided*, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources. Such financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. In prescribing such terms and conditions for licensees required to have and maintain financial protection equal to the maximum amount of liability insurance available from private sources, the Commission shall, by rule initially prescribed not later than twelve months from December 31, 1975, include, in determining such maximum amount, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required of, all of the licensees of such facilities without

regard to the manner in which they obtain other types or amounts of such financial protection: *And provided further*, That the standard deferred premium which may be charged following any nuclear incident under such a plan shall be not less than $2,000,000 nor more than $5,000,000 for each facility required to maintain the maximum amount of financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission. The Commission is authorized to establish a maximum amount which the aggregate deferred premiums charged for each facility within one calendar year may not exceed. The Commission may establish amounts less than the standard premium for individual facilities taking into account such factors as the facility's size, location, and other factors pertaining to the hazard. The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection in-

cluding without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(c) Indemnification from public liability in excess of level of financial protection; aggregate indemnity

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1987, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however*, That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1987, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1987.

(d) Indemnification agreements for construction or operation of production or utilization facilities, or other activities; applicability to contracts; sovereign immunity

In addition to any other authority the Commission may have, the Commission is authorized until August 1, 1987, to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substan-

tial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in the amount of $500,000,000, excluding costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident: *Provided*, That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000: *Provided further*, That in the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Commission shall not exceed $100,000,000. The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Commission. A contractor with whom an agreement of indemnification has been executed and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this section, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Aggregate liability for a single nuclear incident

The aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage, shall not exceed (1) the sum of $500,000,000 together with the amount of financial protection required

of the licensee or contractor or (2) if the amount of financial protection required of the licensee exceeds $60,000,000, such aggregate liability shall not exceed the sum of $560,000,000 or the amount of financial protection required of the licensee, whichever amount is greater: *Provided*, That in the event of a nuclear incident involving damages in excess of that amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude: *And provided further*, That with respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate liability shall not exceed the amount of $100,000,000 together with the amount of financial protection required of the contractor.

(f) Collection and amount of fee

The Commission is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided*, That the Commission is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above a level of $60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility.

For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of facilities and services of private insurance organizations

In administering the provisions of this section, the Commission shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 5 of Title 41 upon a showing by the Commission that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreement of indemnification: settlement of claims

The agreement of indemnification may contain such terms as the Commission deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) Survey of causes and extent of damage; report to Joint Committee, Congressmen of affected districts and Senators of affected States; availability to public

After any nuclear incident which will probably require payments by the United States under this section or which will probably result in public liability claims in excess of $560,000,000, the Commission shall make a survey of the causes and extent of damage which shall forthwith be reported to the Joint Committee, to the Congressmen of the affected districts, and to the Senators of the affected States, and, except for information which would cause serious damage to the national defense of the United States, all final findings shall be made available to the public, to the parties involved and to the courts. The Commission shall report to the Joint Committee by April 1, 1958, and every year thereafter on the operations under this section.

(j) Contracts in advance of appropriations

In administering the provisions of this section, the Commission may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, and 1349-1351 and subchapter II of chapter 15 of Title 31.

(k) Exemption from financial protection requirement; indemnification from public liability in excess of $250,000; aggregate indemnity; waiver

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a) of this section. With respect to licenses issued between August 30, 1954, and August 1, 1987, for which the Commission grants such exemption:

(1) The Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons in-

demnified in connection with each nuclear incident shall not exceed $500,000,000, excluding cost of investigating and settling claims and defending suits for damage;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1987, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1987.

(l) Indemnification agreements in connection with nuclear ship Savannah

The Commission is authorized until August 1, 1977, to enter into an agreement of indemnification with any person engaged in the design, development, construction, operation, repair, and maintenance or use of the nuclear-powered ship authorized by section 1206 of Title 46, and designated the "nuclear ship *Savannah*". In any such agreement of indemnification the Commission may require such person to provide and maintain financial

protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising from a nuclear incident in connection with such design, development, construction, operation, repair, maintenance or use and shall indemnify the person indemnified against such claims above the amount of the financial protection required, in the amount of $500,000,000 excluding costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with each nuclear incident: *Provided*, That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000.

(m) Agreements for establishment of procedures for handling, investigation, and settlement of public liability claims; emergency assistance payments

The Commission is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses; jurisdiction and venue of public liability actions; removal or transfer of actions; process

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(a) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(b) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility, or

(c) during the course of the contract activity arises out of or results from the possession, operation, or use by a Commission contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

the Commission may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than twenty years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to

a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from an extraordinary nuclear occurrence, the United States district court in the district where the extraordinary nuclear occurrence takes place, or in the case of an extraordinary nuclear occurrence taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, any such action pending in any State court or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States.

(o) Percentage limitation; distribution plans; claim disposition and fund distribution plans; allocation for personal injury, property damage, and possible latent injury claims; approval, disapproval, or modification; adoption of

other plan; orders for implementation and enforcement of provisions; area orders effective; report to Joint Committee by Commission; contents

Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under subsection (e) of this section:

(1) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(2) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (3) of this subsection (o); and

(3) The Commission shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to ap-

prove, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(4) The Commission shall, within ninety days after a court shall have made such determination, deliver to the Joint Committee a supplement to the report prepared in accordance with subsection (i) of this section setting forth the estimated requirements for full compensation and relief of all claimants, and recommendations as to the relief to be provided.

(p) Report to Congress by Commission; contents

The Commission shall submit to the Congress by August 1, 1983, a detailed report concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-993

In The

Supreme Court of the United States

October Term, 1984

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., J. RAY McDERMOTT & CO., CATALYTIC, INC., and BURNS & ROE, INC.,

Petitioners,

v.

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE AND SHIRLEY A. BADDE, HIS WIFE, ALBERT C. GEORGE AND M. ISABEL GEORGE, HIS WIFE, VICTOR HEBEL, P.G. ENGINEERING, CHANCEFORD MANOR VILLAGE SEWAGE CO., CHANCEFORD MANOR VILLAGE WATER CO., INC., DOROTHY S. HOSTETTER, L. RICHARD HARNER AND LINDA HARNER, HIS WIFE, JAMES BARRON AND DIANE BARRON, HIS WIFE, MARGARET MARY JONAS, CUMBERLAND WOODCRAFT COMPANY, INC., POCONO BUSINESS FURNITURE, INC., FORGET-ME-NOT, INC., LARRY WELKER FORD, INC., DR. MAXINE C. BUSH, REV. ALVA ROMPKINS, MUSETTE DUGGAN, WELS I. ZIMMERMAN, HARRY WALLACH, MARY W. HUTCHINSON, STEPHEN M. YOUNG, FMG INVESTMENTS, INC., GETTYSBURG TOURS, INC., HERITAGE INNS, INC., L.E. SMITH WHOLESALE DISTRIBUTORS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a prevailing party lack standing to review the dismissal of a Complaint for lack of federal subject matter jurisdiction so as to obtain an advisory opinion from this High Court with regard to the issue of federal subject matter jurisdiction and the merits of the underlying claim?

2. Where all parties now concede, the applicability of state law to claims brought pursuant to the Price-Anderson Act, and the Courts have uniformly held the same, a federal district court, and in the absence of an "extraordinary nuclear occurrence" cannot sustain "arising under" jurisdiction wherein the plaintiffs seek traditional tort damages for injuries sustained as a result of the alleged negligence of utility and non-utility defendants.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the caption of the case, on motion in the District Court, Chanceford Manor Village Sewage Co., Chanceford Manor Village Water Co., and Mary W. Hutchinson have been voluntarily dismissed.[1]

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1. Pursuant to Rule 28.1 of the Revised Rules of the Supreme Court of the United States, none of the corporate respondents have any parent companies or non-wholly owned subsidiaries or affiliates.

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Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondents, Donald A. Stibitz, New Freedom Lumber Co., Inc., Richard K. Baade and Shirley A. Baade, his wife, Albert C. George and M. Isabel George, his wife, Victor Hebel, P.G. Engineering, Dorothy S. Hostetter, L. Richard Harner and Linda Harner, his wife, James Barron

and Diane Barron, his wife, Margaret Mary Jonas, Cumberland Woodcraft Company, Inc., Pocono Business Furniture, Inc., Forget-Me-Not, Inc., Larry Welker Ford, Inc., Dr. Maxine C. Bush, Rev. Alva Rompkins, Musette Duggan, Wels I. Zimmerman, Harry Wallach, Mary W. Hutchinson, Stephen M. Young, FMG Investments, Inc., Gettysburg Tours, Inc., Heritage Inns, Inc., L.E. Smith Wholesale Distributors, Inc., Individually and on behalf of all others similarly situated, respectfully pray this Court deny a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 24, 1984.

—o—

OPINIONS BELOW

The opinions below are set forth in the Petition for a Writ of Certiorari at page 2 and in Petitioners' Appendix at A-1 (746 F. 2d 993 (3rd Cir. 1984).), A-20 and A-10 respectively.

—o—

STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth, and incorporated by reference by respondents, in the Petition for a Writ of Certiorari at page 3. Respondents however contend that Petitioners lack Article III standing to maintain this appeal.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petition for a Writ of Certiorari at page 4.

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COUNTER-STATEMENT OF THE CASE

Respondents incorporate Petitioners' statement of the case as set forth in Petitioners' Writ at pages 5 through 7 with the following provisos.

Respondents find Petitioners' estimate of damages in excess of one billion dollars to be totally speculative on the state of the current record. Respondents seek only those damages for increased utility rates which are directly attributable to the negligence and culpability of the defendants and which have been passed on by regulatory agencies to the rate paying public. There has been no discovery on the merits below and such an estimation at this stage of the proceedings is totally unwarranted.[2]

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2. Petitioners argue, apparently as a reason for federal court jurisdiction in this case, that "increased electric rates at issue here far exceed one billion dollars." (Petition, p. 12). This large amount, it is argued further, if awarded in this litigation "could directly affect the United States Treasury as well as the finances of all other utilities operating nuclear reactors . . ." Further, the question of how much damages would be proved at trial in this case is speculative at this point and hardly seems a sound basis for Federal Court jurisdiction. The amount of damages will certainly not be the same as the rate increases cited by Petitioners as "at issue here." (Petition, p. 12 and especially footnote 7, citing Petitioners' Appendix at A-58). Some part of those rate increases have nothing to do with Petitioners' misconduct and the resulting damages to Respondents.

Respondents have brought suit and charged the defendants with negligence stemming from their culpability in connection with the Three Mile Island disaster, which caused the regulatory agencies of the Commonwealth of Pennsylvania and the State of New Jersey to pass on increases in utility rates to the consumming public. These regulatory agencies could not and indeed did not consider the culpability of the defendants when approving the rates. Indeed, several of the petitioners, Babcock & Wilcox Co., J. Ray McDermott & Co., Catalytic, Inc., and Burns & Roe, Inc., are not utilities and were not ever arguably subject to the jurisdiction of the utility commissions nor involved in rate making.[3] The Third Circuit Court of Appeals, having now spoken with regard to a lack of federal subject matter jurisdiction, the transfer provision of 42 Pa.C.S. § 5103, should now apply so that this suit can be orderly and effectively transferred to a state court in Pennsylvania for disposition in accordance with state law.

Contrary to Petitioners' contentions at page 5 of their Petition, these actions will not start anew but will now continue to be litigated in the state courts.

For reasons previously set forth by the Third Circuit Court of Appeals in their opinion, and by respondents at a later point in this response, the state courts are quite capable of applying state law to these causes of action subject to the financial protection provisions of the federally created Price-Anderson Act.

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3. As to these petitioners, traditional state tort law principles apply for any damages stemming from their culpable conduct, without reference to the intervening rate approvals of the regulatory commission.

REASONS FOR DENYING THE WRIT

This action was one of many actions brought in the aftermath of the Three Mile Island incident. Many of the actions, indeed those brought by present counsel for respondents, were originally commenced in state court and removed to the Federal District Court by petitioners. At that time, federal jurisdiction was asserted pursuant to their being a so-called "extraordinary nuclear occurrence" in accordance with 42 U.S.C. §§ 2014(j), 2210(n). Subsequent to their removal, the NRC determined there was not an "extraordinary nuclear occurrence." The actions remained in federal court in accordance with the district court's opinion in *In Re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980). This suit was subsequently commenced in the Federal District Court relying on that opinion as a basis for federal jurisdiction.[4]

The Third Circuit Court of Appeals has found a lack of "arising under" jurisdiction and this cause of action is now capable of being transferred to the state court where it rightfully should have been brought. This is in keeping with the legislative history of the Price-Anderson Act, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al.*, 710 F. 2d 117 (3rd Cir. 1983), and the Petitioners' prior positions in this litigation and other litigations, wherein they always contended that federal common law does not apply and that the actions are brought and governed by traditional state law.

Further, petitioners are the prevailing parties in the federal proceedings. As such, they lack standing to cha!-

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4. A state protective action was not necessary to protect state jurisdiction because of the existence of 42 Pa.S.C. § 5103.

lenge the ruling below, and are simply seeking an advisory opinion from this High Court for the industry in the event of a hypothetical future nuclear disaster or occurrence.

A.

The Petitioners, are prevailing parties, the claims of the plaintiff-respondents having been dismissed by the Third Circuit Court of Appeals. As such, they lack standing to maintain the instant petition. It is indeed hornbook law that a party may not appeal from a judgment or decree in their favor which is not necessary to support the final order of dismissal. *Electrical Fittings Corporation, et al. vs. Thomas & Betts Co., et al.,* 307 U.S. 860 (1939).

Petitioners are not aggrieved by the judgment of the Court below in that they have prevailed. As such, their appeal is not proper. *In Re Glenn W. Turner Enterprises Litigation,* 521 F. 2d 775 (3rd Cir. 1975).

Petitioners in the instant case simply seek an advisory opinion from this Court with regard to a determination in their favor.

Petitioners may have well-intentioned practical motives in that they represent the insurance compensation structure established by the Price-Anderson Act. They seek review to establish federal jurisdiction in the event of a future nuclear disaster or incident. However well-intentioned the instant writ is from a practical and sound business point of view of the insureds, it runs afoul of sound principles of jurisdprudence founded in Article III of the Constitution which is the oldest and most consistent thread in the federal law of justiceability. Simply put, advisory opinions are not to be rendered. *Flast v. Cohen,* 392 U.S. 83 (1968); *Bodkin v. United States,* 266 F. 2d 55 (2nd Cir. 1959).

B.

The Petitioners will not be prejudiced by allowing this case to proceed in the Pennsylvania state court.

Although, because of the district court's finding of jurisdiction, early on in the related litigations these matters have been proceeding in the federal system, defendants are in no different position by a transfer to the state court pursuant to 42 Pa.C.S. § 5103 at this time than they would have been if the related state court actions originally filed shortly after the occurrence had been removed to federal court and had then been immediately remanded to state court. Such orders of remand are not subject to appeal.[5]

Petitioners' desire to concentrate all litigation in one forum and their concern over the loss of a single forum by virtue of different state courts hearing these claims is misplaced. The Pennsylvania state courts have the ability to transfer like cases to one jurisdiction for disposition. Pa.R.C.P. 213(e) (2).

Further, the Pennsylvania state courts, under conflict of laws principles, can apply New Jersey law with regard to those issues in the instant case which are peculiar to New Jersey. *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964).

Indeed, since petitioners' (see subsection C below) and all courts who have considered the choice of law in a Price-Anderson context have uniformly found the appli-

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5. 28 U.S.C. § 1447(d); *Gravitt Etc., et al. v. Southwestern Bell Telephone Company, et al.*, 430 U.S. 723 (1977), rehearing denied, 431 U.S. 975 (1977); *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976), *c.f. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

cation of state law principles to govern the Pennsylvania state courts will not have to draw educated guesses as to what Pennsylvania law is. A federal court applying state law may have to not only draw educated guesses as to New Jersey law but also as to Pennsylvania law. Indeed, the state systems are thus more suited for resolution of these claims.

C.

Petitioners, since the inception of this and related Three Mile Island litigations, have consistently argued for the application of state law principles within the Price-Anderson context. Indicative of this approch is their summary of argument presented to the United States Court of Appeals for the Third Circuit in the instant case.[6] Indeed, where plaintiffs in related cases cried for the application of federal common law, the petitioners effectively parried the same and gained court approval of their views. *Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al., supra.*[7]

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6. Set forth at A. 1 through A. 2 in the Appendix to this response.

7. In accord are the opinions in the instant case rendered by the Magistrate at A-15 of Petitioners' Appendix and the Third Circuit Court of Appeals at A-3 through A-9 of Petitioners' Appendix (746 F. 2d 993 (3rd Cir. 1984)). Further evidencing the strong tradition of applying state law in the context of a Price-Anderson claim is *Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615 (1984) and *Duke Power Co., supra.*

That the courts have opted for the application of state law comes as no surprise in light of the clear congressional legislative history which dictates the same. S. Rep. No. 296, 85th Cong., 1st Sess. 9, reprinted in 1957 U.S. Code Cong. and

(Continued on following page)

Against this backdrop, the Third Circuit held (Petitioners' Appendix at A-9, 746 F. 2d at 997) that plaintiffs' federal law claims were "wholly insubstantial" and provided no basis for federal jurisdiction citing *Bell v. Hood*, 327 U.S. 678 (1946).

(Continued from previous page)

Admin. News 1803, 1810; S. Rep. No. 1605, 89th Cong., 2nd Sess. 6, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3206; S. Rep. No. 1605, 89th Cong., 2nd Sess. 9, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3209.

Respondents in this case seek *damages* for the harm done by Petitioners' misconduct (as alleged in the Complaint), measured by the difference in electric rates caused by that misconduct. Respondents rely on numerous cases decided by the Pennsylvania Courts accepting jurisdiction for such claims and accepting this measure of damages as proper where a cause of action in contract or tort under state law *involving a utility* is properly alleged under state law.

As succinctly stated by the Pennsylvania Courts:

> "Jurisdiction over suits for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts is in the Courts."

Bell Telephone Company v. Pa. PUC, 53 Pa. Comwlth. Ct. 241, citing *Feingold v. Bell Telephone Co.*, 477 Pa. 1, 383 A. 2d 791 (1978) and *Behrend v. Bell Telephone Co.*, 242 Pa. Super. 47, 59 (1976), vacated and remanded 473 Pa. 320, 374 A. 2d 536 for consideration of validity of limitations provisions. *See also, e.g., Byer v. People's Natural Gas Co.*, 251 Pa. Super. 75 (1977). Obviously, liability of the non-utility defendants is governed by traditional tort principles.

Respondents, therefore, wish to point out that the question of whether damages are recoverable for misconduct resulting in an increase in utility costs to customers is an issue wholly to be determined under state law. It should be noted that the District Court in this case never addressed itself to any of these state law cases while at the same time declaring that the Price-Anderson Act "does not of itself define or create any causes of actions." (Petitioners' Appendix at A-15).

The only connection the instant litigation has with the federal system is the implementation of the compensation scheme of Price-Anderson. As the Third Circuit so explicitly stated this in and of itself does not show that plaintiffs' original cause of action arises under the laws of the United States. (See Petitioners' Appendix at A-5, A-6, 746 F. 2d at 996).[8]

CONCLUSION

The Petition for a Writ of Certiorari should be denied in that Petitioners lack standing and simply seek an advisory opinion of this High Court. The basis of Petitioners' position is also devoid of merit as "arising under" jurisdiction cannot be invoked by virtue of the fact that the Price-Anderson Act dictates the application of state law principles, which are best left to state courts to resolve.

Respectfully submitted,

/s/ Arnold Levin, Esquire
Counsel of Record

Howard J. Sedran, Esquire
Laurence S. Berman, Esquire

8. Indeed, state courts have traditionally utilized federal limitation statutes in adjudicating manners. See specifically, state court administration of the limitation of liability statute with regard to maritime causes of action when the state court has original jurisdiction. *Langnes v. Green*, 282 U.S. 531 (1931). State courts can also adjudicate federal claims. *Miller v. Reading Co.*, 292 Pa. 44 (1927) (Federal Safety Appliance Act); *Commonwealth v. Creamer*, 464 Pa. 2 (1975) (Civil Rights Act of 1871); *Charles Dowd Fox Co. v. Courtney*, 368 U.S. 502, 7 (1962) (Labor Management Relations Act Opinion).

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APPENDIX

II. SUMMARY OF ARGUMENT

Under the Price-Anderson Act system of compensation, the first tier of analysis in determining the right of claimants to relief looks to state law as the source of the applicable rules of decision. In this case, the plaintiffs, in order to establish a right to relief, were required to demonstrate that a claim would lie under Pennsylvania tort law for recovery of the increases in price which they, as ratepayers, have paid for electricity since the Three Mile Island accident.

Under Pennsylvania tort law, there are at least three independent reasons why such relief is not available. First, in the circumstances of this case no legal right of plaintiffs was infringed such as to give rise to a right to relief. Plaintiffs have no "right" to purchase electricity at rates other than those found just and reasonable by order of the two state regulatory agencies here involved. Second, because of the circumstances intervening between damage to the Unit 2 reactor and the later higher rates plaintiffs paid (including intervening regulatory decisions), plaintiffs cannot establish the element of causation, as a matter of law. And third, the kind of price increase recovery which they seek, which is non-parasitic to any physical or personal injury, is not available as a matter of law.

While in certain cases, the Price-Anderson Act might alter the rules of recovery otherwise nominally afforded under state law, this is not such a case. The result here under state law is consistent with the Price-Anderson Act, as evident from the Act itself and its legislative history.

Contrary to plaintiffs' weak suggestion to the contrary, there are no disputed issues of material fact which impede the granting of summary judgment in the present action. Accordingly this court should affirm dismissal of plaintiffs' claims.

FEB 15 PAGE 12

Supreme Court, U.S.
FILED
JAN 24 198:
ALEXANDER L. STEVAS
CLERK

No. 84-993

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., J. RAY MCDERMOTT & CO., CATALYTIC, INC., and BURNS & ROE, INC.,

Petitioners

v.

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE AND SHIRLEY A. BAADE, HIS WIFE, ALBERT C. GEORGE AND M. ISABEL GEORGE, HIS WIFE, VICTOR HEBEL, P. G. ENGINEERING, CHANCEFORD MANOR VILLAGE SEWAGE CO., INC., CHANCEFORD MANOR VILLAGE WATER CO., INC., DOROTHY S. HOSTETTER, L. RICHARD HARNER AND LINDA HARNER, HIS WIFE, JAMES BARRON AND DIANE BARRON, HIS WIFE, MARGARET MARY JONAS, CUMBERLAND WOODCRAFT COMPANY, INC., POCONO BUSINESS FURNITURE, INC., FORGET-ME-NOT, INC., LARRY WELKER FORD, INC., DR. MAXINE C. BUSH, REV. ALVA TOMPKINS, MUSETTE DUGGAN, WELS I. ZIMMERMAN, HARRY WALLACH, MARY W. HUTCHINSON, STEPHEN M. YOUNG, FMG INVESTMENTS, INC., GETTYSBURG TOURS, INC., HERITAGE INNS, INC., L. E. SMITH WHOLESALE DISTRIBUTORS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY BRIEF ADDRESSING ARGUMENTS FIRST RAISED BY RESPONDENTS

Respondents suffered summary judgment in the district court, but had their claim revived by the decision of the Court of Appeals ordering that the action be dismissed for lack of subject matter jurisdiction. In such circumstances, it may not be surprising that respondents now recant their original invocation of federal jurisdiction and find persuasive the reasoning of the Court of Appeals. It is surprising, however, that they suggest to this Court that petitioners lack "standing" to seek review of the Court of Appeals' decision because they were the "prevailing" parties[1].

The fallacy of respondents' contention is apparent at two levels. First, wholly aside from the fact that petitioners lost the benefit of a judgment on the merits, a decision, denying subject matter jurisdiction is reviewable in this Court at the behest of a party asserting a right to litigate in federal court.[2] Here, petitioners have a stake in federal subject matter jurisdiction, they have been deprived of that jurisdiction, and the controversy is sharply presented to this Court.

Second, respondents' fundamental premise, that petitioners prevailed in the Court of Appeals, is directly

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1. *See* Response to Petition, pp. 5-6.

2. If citation is necessary to support this point, any one of a myriad of cases in which the determination of jurisdiction was made before any decision on the merits will suffice. See, *e.g.*, *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983). The fact that petitioners were defendants rather than plaintiffs below is of no significance in the present context. Under existing law, defendants have as much right to federal jurisdiction under the "arising under" statutes as do plaintiffs. See 28 U.S.C. §1441. Contrary to the example cited by respondents (Response to Petition, p.7), this is not a case in which the federal district court remanded an action to state court, a decision which is not reviewable. The closer analogy is the case in which the district court refuses to remand and the Court of Appeals later reverses. The defendant unquestionably has standing to seek review of that decision in this Court. *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

at odds with reality. The only prevailing parties were respondents. In the district court, petitioners had obtained a judgment in their favor on the merits dismissing all of respondents' claims. Unless modified by the Court of Appeals, that judgment, by virtue of the doctrine of *res judicata*, foreclosed respondents from any further litigation of their claims in the state or federal courts.

The decision of the Court of Appeals rendered petitioners' judgment a nullity and provided respondents with the opportunity, which they did not have before, to relitigate their claims in the state courts unrestrained by the prior federal judgment. To contend, therefore, that petitioners prevailed because the district court was "affirmed" is an elevation of form over substance. As this Court has succinctly stated, the right to a judgment on the merits is so "substantial" that a party "is obviously aggrieved by the loss of that judgment." *Parr v. United States*, 351 U.S. 513, 517 n.9 (1956).

Beyond the standing issue, respondents have little to say about the worthiness of this case for review. They suggest, for example, that their claim may not exceed one billion dollars, hence (by implication) may not exceed the limit on liability under the Price-Anderson Act.[3] Petitioners agree that respondents' claim is, in their words, "speculative", and that were the merits of a damage calculation reached, far less should ultimately be in controversy. That does not diminish, however, the reach of the claim respondents have asserted, given the magnitude of the rate increases which have been ordered since the Three Mile Island accident. And far less does it argue that this case is not worthy of review.

Beyond standing and a quarrel over how many hundreds of millions they seek, respondents make only two other points. First, they argue that petitioners will suffer no prejudice if this case is begun anew in the state courts.[4] Second, they contend that petitioners agree that

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3. Response to Petition, p.3.
4. Response to Petition, p.7.

state law should apply in any event.[5] As to the latter point, petitioners have recognized throughout that the content of rules of decision drawn from state law will, as a matter of Congressional choice, play a significant role in this litigation; but that is the point of departure for petitioners' position, not its conclusion.[6] And as to whether there will be prejudice in a recommencement of this litigation in the state court systems, the prior discussion of the *res judicata* effect of the district court judgment is a full refutation; it is no accident that respondents' discussion on this point entirely ignores the judgment on the merits rendered against them. To the extent any further response is necessary as to either of these contentions, petitioners are content to rely on their statements in the Petition. In neither case does respondents' argument denigrate the importance of this case as one for review by this Court.

Respectfully submitted,

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5. Response to Petition, pp.7-8.

6. In fact, respondents have mischaracterized petitioners' consistent position with respect to the role which state law plays in relation to the Price-Anderson Act. That position is summarized in the Petition at pp.15-18.